

JOURNAL
OF
COMPARATIVE LEGISLATION
AND
INTERNATIONAL LAW

EDITED FOR
THE SOCIETY OF COMPARATIVE LEGISLATION

BY
F. M. GOADBY, Esq., D.C.L.

Let observation, with extensive view,
Survey mankind from China to Peru.
SAMUEL JOHNSON.

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INTERNATIONAL LAW

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THE SOCIETY OF COMPARATIVE LEGISLATION

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*All communications to be addressed to the Hon. Editor,
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Let the student be well equipped with
the knowledge of the history of the
law, and the history of the law of the
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CONSTITUTIONAL AMENDMENTS IN AUSTRALIA

[Contributed by JOSEPH E. BROADBENT, ESQ., B.A., I.S.O., *Parliamentary Counsel and Draftsman for the State of Queensland.*]

DURING the months of October, November, and December of the year 1942, and throughout the present year 1943, certain important Constitutional happenings have occupied the attention, not only of the Parliaments, but of the Press and citizens generally in Australia.

The matter arose by the introduction of and the reading of a first time of a Bill to alter the Constitution by empowering the Parliament (of the Commonwealth) to make laws for the purpose of carrying into effect the war aims and objects of Australia as one of the United Nations, including the attainment of economic security and social justice in the post-war world, and for the purpose of post-war reconstruction.

The Bill by Clause 2 purported to alter the present Constitution of the Commonwealth (which Constitution is contained in s. 9 of the Commonwealth of Australia Constitution Act (63 & 64 Vic., c. 12) of the Imperial Parliament, by inserting in Chapter 1 after Part V a new part covering War Aims and Post-War Reconstruction.

In his speech on the introduction of the Bill, the Attorney-General and Minister for External Affairs (the Rt. Hon. H. V. Evatt) pointed out that when the war was over, Australia would be confronted with the greatest task of economic rehabilitation in her history. Problems of employment, of housing, of health and child welfare, of vocational training, of markets and price stability would call for enterprise and statecraft of the highest order. The whole history of the Commonwealth Constitution showed that those problems could not be solved without wider powers in the hands of the central government.

"In war-time," Dr. Evatt continued, "in Australia the defence power has given the Commonwealth sufficient authority to handle the acute problems that arise. In the post-war world, the problems will be no less acute, or less urgent. There will be no defence powers on which to rely, and unless the Commonwealth is given sufficient power by the people the whole social and economic life of Australia will be placed in great jeopardy." "Positive, quick, and courageous action," he continued, "must be taken after the war to ensure employment and social security for all, improved health and child-welfare standards, the housing of the people, the promotion of economic stability. These are all major matters of policy that must be contemplated on an Australian and not on a State or sectional basis. We cannot afford to leave any doubt about the powers of the Commonwealth to deal with them directly or to delegate such functions as it desires to the States and local authorities. While delegation will often be essential, a supreme directing and responsible authority is an absolute condition of success in the attack on post-war problems. Divided authority causes hesitancy, irresponsibility, and doubts. These are not the conditions under which a national plan for social security and economic advancement can be developed. A national plan requires national action. This can only be assured by granting appropriate power to the National Parliament."

After pointing out that while events have proved that the existing Constitution which the Australian people adopted in 1900 was flexible enough for the needs of war, Dr. Evatt stressed that it was equally true that it was not flexible enough to serve Australia in the great task of post-war re-organization which the declared war aims of the United Nations would involve.

"If the exercise of national power is necessary for war, it is equally necessary for reconstruction," he continued, and "without carefully considered constitutional amendment the result in the post-war world of Australia will be social and economic disorganization, chaos in production, mounting unemployment, widespread social insecurity—in short, anarchy." "But the problem," he averred, "goes even

deeper. This country, like all the other United Nations, has pledged itself to the task of achieving the broad objectives embodied in the Atlantic Charter and in the historic declaration of the four essential human freedoms—freedom of speech and expression, freedom of worship, freedom from want, freedom from fear—anywhere and everywhere in the world. These declarations are not legal instruments, technically binding on Australia. But they are far more. They are solemn pledges of our dedication as a nation to the great ends of economic security, social justice, and individual freedom.” Dr. Evatt further stressed that it was an important part of the war effort itself that some plan of economic and social justice should now be prepared as some guarantee to the men and women of Australia that their self-sacrifice would not have been in vain. It was plain, too, that if no action were taken until the war was over, it would then be too late. The problems arising on the termination of hostilities would require action as drastic and as urgent as the war itself. “But the Constitution amending process,” he stressed, “takes some time and a great constitutional change should never be carried out without careful consideration. We should prepare for the task now. Later may be too late.”

Turning to the form of the Bill, Dr. Evatt remarked: “It is proposed to insert the alterations not in Part V of Chapter 1 of the Constitution, which contains the principal existing powers of the Parliament, but in a separate part immediately following it. To inject the new powers among the old would lead to confusion. None of the limitations contained in the rest of the Constitution will apply to the powers contained in the new s. 60A. No time limit is fixed for the duration of the ‘war aims and reconstruction’ powers. They will and should remain available as long as the needs that call them into being. . . . I should perhaps draw attention to one feature of these new powers that is entirely new in Australian constitutional history.”

“It will be found in the first paragraph of the new sub-s. (2) of s. 60A. It is proposed that the Parliament should have power to make any law which in its own declared opinion will tend to achieve economic security and social justice; including security of employment and the provision of useful occupation for all the people. I desire to make it perfectly clear that the amendment I propose will give the decision to Parliament itself, and no person will be able to challenge the validity of Parliament’s decision. For its decisions and actions, Parliament will be responsible to one authority only—the people of Australia.” Dr. Evatt, after pointing out that the measure was not a “party” measure and trusting that it would not be so considered, concluded his address by expressing the hope that the States of Australia would see fit to co-operate with the Commonwealth in making a constitutional alteration “which will assist the nation of to-day to prosecute the present war to a victorious conclusion, and will at the same time help to lay a sure foundation for the nation of to-morrow.”

On October 9, 1942, the Prime Minister of the Commonwealth (the Rt. Hon. John Curtin) addressed a communication to the Premiers of each State pointing out the introduction of the Bill above referred to, and stating that his Government had decided that, as a preliminary step, the proposals should be considered by a Special All-Party Convention consisting of four Senators and eight Members of the House of Representatives (six of the twelve representing the Government and six representing the Opposition). The Prime Minister also advised that it was the desire of his Government that the Premier and the Leader of the Opposition in each State should also participate in the deliberations of the Convention, and accordingly issued to the Premier of Queensland (the Hon. F. A. Cooper, M.L.A.) an invitation to that end. The date of the Convention was subsequently fixed for November 24, 1942, to be holden at Canberra, the capital and seat of Government of the Commonwealth.

On a motion in the Queensland Parliament¹ moved by the Hon. the Premier on

¹ *Queensland Parliamentary Debates*, 1942, pp. 810, 811, 874, 957.

October 30, 1942, that the letter of the Prime Minister be printed, an interesting debate took place on that date and on the following day and on November 3 and 5. No resolution, however, was moved and each Member was free to express his own individual views of the proposal of the Commonwealth. The matter also was freely debated in the Press.

The reception of the Bill was generally so far as Parliaments of the States were concerned, unfavourable. While it was admitted that further reconstruction powers were essential, it was considered that the Federal proposals erred in that they were vague and indefinite; that they would give to the Commonwealth Parliament such extensive powers as would enable any measure passed in accordance with them to override the existing (or basic Federal) Constitution itself. It was also averred that the Bill would give to the Commonwealth Parliament an unlimited charter of power not only to enact a law thereunder, but authority to act as its own interpreter of that power. The proposals would also remove any possibility of a State or any citizen challenging the validity of a law purporting to have been passed under the power, as the High Court (referred to by the late Sir John Quick in his work "Legislative Powers of Commonwealth and States," as "the keystone of the arch of the Federal system") would be powerless to intervene and decide its constitutionality, as it would be a law "in the declared opinion of Parliament."

Objection was also raised that such a measure would destroy the very essence of the Federal system, namely, a compact or partnership with both the Commonwealth and the States each sovereign within their spheres, both being on the same constitutional plane of equality—there being no superiority of the Commonwealth and no inferiority of the States.

A highly important summary of the powers of Commonwealth and State will be found in the recent Uniform Tax Case (or as it is cited, *The State of South Australia v. The Commonwealth* (1942), 65 C.L.R., p. 373). That case was to determine the legality of what is called the "Commonwealth Uniform Taxation Scheme," whereby pursuant to four Commonwealth Acts of Parliament,² the Commonwealth instituted a scheme of taxation under which Acts practically the whole of the income taxing orbit was taken over by the Commonwealth, leaving practically no field for State Income Taxation—a State agreeing to levy and collect no such State Taxation to be reimbursed according to a defined schedule of payment by way of financial assistance, or grant.

"The Commonwealth Parliament is limited in its legislation by the grants of power made by the Constitution and by the prohibitions contained in the Constitution, as well as by the Colonial Laws Validity Act—the Statute of Westminster, 1931, not having been adopted by the Commonwealth—but no law which is within a Commonwealth power can be rendered invalid by any State law, though a State law which, apart from action by the Commonwealth Parliament, would be valid, may be invalid by reason of inconsistent provisions in a Commonwealth law (s. 109)."

It must not be lost sight of, however, that since the judgment of the High Court in the Uniform Income Tax case was delivered on July 23, 1942, the Commonwealth Parliament has passed an Act—the Statute of Westminster Adoption Act,³ 1942—the long title of which is "An Act to remove doubts as to the validity of certain Commonwealth legislation to obviate delays occurring in its passage, and to effect certain related purposes by adopting certain sections of the Statute of Westminster, 1931, as from the commencement of the War between His Majesty the King and Germany." S. 3 of the Commonwealth measure adopts ss. 2, 3, 4, 5, and 6 of the Imperial Act (so far as the Commonwealth is concerned)

² States Grants (Income Tax Reimbursement) Act, 1942 (No. 20 of 1942), Commonwealth. Income Tax (War-time Arrangements) Act, 1942 (No. 21 of 1942), Commonwealth. Income Tax Assessment Act, 1942 (No. 22 of 1942), Commonwealth. Income Tax Act, 1942 (No. 23 of 1942), Commonwealth.

³ Act No. 56 of 1942 of the Commonwealth.

which in brief provide (2) that the Colonial Laws Validity Act, 1865, shall not apply to the Commonwealth of Australia and that no law of the Parliament thereof shall be void or inoperative on the ground of repugnancy to the laws of England; (3) such Parliament has full power to make laws having extra-territorial operation; (4) that no Act of the Parliament of the United Kingdom passed after December 11, 1931, shall extend or be deemed to extend to the Commonwealth as part of the law thereof unless it is expressly declared in that Act that the Commonwealth has requested and consented to the enactment thereof; (5) ss. 735 and 736 of the Imperial Merchant Shipping Act, 1894, shall be construed as though reference therein to the legislature of a British possession did not include reference to the Parliament of the Commonwealth, and (6) s. 4 of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspended clause) and so much of s. 7 of that Act as requires the approval of His Majesty in Council to any rules of Court regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in the Commonwealth.

The somewhat prolific extracts quoted above serve to indicate that the original notion of what may be called "combined sovereignty," i.e., the Commonwealth and States each being sovereign in their respective spheres obtains; this result is achieved despite the belief one time held that the Engineers' Case shattered any notion of equal sovereignty.⁴

But the apprehended far-reaching result of the Engineers' Case has been considerably mollified by later Court interpretation of that case itself.

Objection to the proposals in the Bill were on a general basis made owing to the threatened destruction of the sovereignty of the States, the complete annulment of the original notion of a federal pact, and a co-partnership among equals.

Touching on another objection, namely that the proposed Bill gave a complete declaratory power to the Parliament itself, it may in the first place be observed that Bills proposing to amend the Constitution giving declaratory powers to the Commonwealth Parliament have already been the subject of referenda, namely under the Governments of 1912 and 1919. The Bills dealt with nationalisation of monopolies. The 1912 Bill would have allowed the Federal Parliament by resolution to declare a business of producing, manufacturing, or supplying services to be a monopoly and would have allowed the Parliament to make laws for carrying on or acquiring the business. The 1919 proposals had a similar proposal, but allowed the High Court to report on the matter.⁵

These Bills failed to pass the Referenda.

Objection was also taken, so far as regards the necessity for increased powers during the War, on the ground that the Commonwealth has, under its Defence Powers, and the power and jurisdiction to legislate for war purposes.

The main authority for that argument is based on the noted case called the Bread Case (*Farey v. Burvett* (1916), 21 C.L.R., 433), which dealt with the power of the Commonwealth to fix the price of bread. Isaacs J. on that occasion delivered a classic judgment, which has formed the basis of recent judgments in the High Court during the present War (for example, *Andrews v. Howell*, 65 C.L.R., 255, as to the validity of the National Security [Apple and Pear] Regulations), where Isaacs J. was quoted by Rich J. at p. 263.

It may be interesting to observe that in the Bread Case, Griffith C.J. and Barton and Isaacs JJ. formed the majority decision, while Gavan Duffy and Rich JJ. dissented. A perusal of the case will also indicate that the then Chief Justice did not go as far in his judgment as did Isaacs J. Griffith indicated that the "control of finance and trade may be the most potent weapon of all." One test, however, must always be applied, namely: Can the measure in question

⁴ See "Thirty Years' Working of the Australian Constitution," Stephen Mills, C.M.G., *Jour. Comp. Leg.*, vol. xv, 1933, p. 1.

⁵ See Quick, "Legislative Powers of Commonwealth and States," p. 618.

conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that the one cannot reasonably be regarded as affecting the other?

In this connection, the case *South Australia v. The Commonwealth*, 65 C.L.R., 1942, p. 373, was to a large extent so far as the majority of the Court were concerned in respect of the decision as to the validity of the War-time Arrangements Act (being one of the Acts in the Commonwealth Uniform Taxation Scheme) based on the judgment of Isaacs J.⁶

Latham C.J. in the Uniform Tax Case applied the above principle and found that the Income Tax (War-time Arrangements) Act was not within the principle, i.e., there was not some connection between such an Act and the defence powers and hence invalid as beyond the powers of the Commonwealth Parliament. Starke J. concurred, but the other three judges decided otherwise.

The defence power was again succinctly raised in a very recent case decided about the time when Convention was held in November, 1942, before the High Court—*State of Victoria and the Attorney-General for the State of Victoria v. The Commonwealth of Australia*. This case dealt with the validity or otherwise of certain statutory rules promulgated by the Commonwealth Government purporting to have been issued under the Commonwealth National Security Act, 1939-40, providing payment (*inter alios*) to State Government servants by the State Government at the same rate as if the first Tuesday in November, 1942 (when the "Melbourne Cup" is usually run, and which in fact was not run on that day but on a Saturday later on) had been declared a holiday.

The result of this important case was that the Statutory Rules as to the holiday pay in question could not be validly applied to Victorian public servants.

This High Court decision given at the time when Convention was assembled is, of course, of the utmost importance, following on the very wide interpretation of the defence powers given by the majority decision of the Court in the Uniform Tax Appeal case.

In other words, laws made by the Commonwealth under the defence powers are subject to the same principle of interpretation by the High Court as those made under any other power, and therefore there is no unlimited power of the Commonwealth to make whatever law Parliament deems fit and proper purporting to be a defence law. And hence what was generally considered to be the law, namely that Parliament having once made up its mind to enact a certain law purporting to be a defence law, the High Court would have no jurisdiction to declare the constitutionality or otherwise of the law, as being a matter extraneous to the functions of the Court, has been shown by the recent judgment of the High Court itself not to be the case.

This position of course would obtain, if the present Constitution were not amended, and would not obtain if the Constitution were amended by the insertion of the new clause 60A in the original tabled Bill hereinbefore mentioned.

Passing from the question of the War powers, which as stated before were considered sufficiently wide enough to enable the Commonwealth to legislate for defence and for the prosecution of the war, objection was also taken to the first Bill on the ground that the present time was not fitting for the holding of a referendum, for the reason that, apart from the expense and labour involved, the minds of the people were far too much occupied with war and matters connected with it to give a cool and deliberative verdict, and also on account of the fact that many thousands of the electors were engaged in war service with the Allied forces on various fronts who would through war exigencies be unable either to record a vote at all, or could not form a deliberate opinion on the question.

The various debates in certain of the State Parliaments and articles and letters in the Press, together with various opinions on the question, were carefully weighed

⁶ See Judgment of Rich J. (who with McTiernan and Williams JJ. formed the majority of the Court), *loc. cit.* at p. 437.

by the Federal Government, as the course adopted by the latter will indicate.

The Constitutional Referendum Conference was opened by the Prime Minister (the Rt. Hon. J. Curtin) at Canberra on November 24th, 1942.

The members of the Conference were as follows:

Commonwealth Representatives : The Prime Minister (the Rt. Hon. J. Curtin); the Attorney-General and Minister for External Affairs, the Rt. Hon. H. V. Evatt; the Minister for the Army, the Hon. F. M. Forde; the Treasurer, the Hon. J. B. Chifley; the Leader of the Opposition, the Rt. Hon. A. W. Fadden; the Rt. Hon. W. M. Hughes; the Rt. Hon. R. G. Menzies; the Rt. Hon. Sir Earle Page, representing the House of Representatives; the Hon. Senator J. S. Collings, Minister for the Interior; Senator the Hon. R. V. Keane, Minister for Trade and Customs; Senator the Hon. G. McLeay, Leader of the Opposition in the Senate; and Senator the Hon. B. Sampson, representing the Senate.

The States were represented by:

N.S.W. : The Premier, Hon. W. J. McKell, M.L.A., and the Hon. A. Mair, Leader of the Opposition.

Victoria : The Premier, Hon. A. A. Dunstan, M.L.A., and the Hon. J. Cain, Leader of the Opposition.

Queensland : The Premier, Hon. F. A. Cooper, M.L.A., and Mr. G. F. R. Nicklin, Leader of the Opposition.

South Australia : The Premier, Hon. T. Playford, M.L.A., and the Hon. R. S. Richards, M.L.A., Leader of the Opposition.

West Australia : The Premier, Hon. J. G. Willcock, M.L.A., and Mr. A. F. Watts, M.L.A., Leader of the Opposition.

Tasmania : The Premier, Hon. R. Cosgrove, M.L.A., and the Hon. H. S. Baker, M.L.A., Leader of the Opposition.

The Prime Minister, in his introductory speech, pointed out that while neither law nor practice required the assembly of such a Convention as the present one, it was a body which should be able to bring to the discussion of the question of constitutional planning for post-war reconstruction a special authority and a special prestige.

The main question at issue was whether the Constitution as it now stands permit of adequate post-war reconstruction. This may be answered in the negative. The Bill introduced by the Attorney-General (i.e., the original Bill hereinbefore referred to) followed closely the statement of the Hon. Treasurer in his budget in which he referred to post-war reconstruction and the need for constitutional reform in relation thereto. Since the introduction of that Bill into the House of Representatives, there had been considerable discussion, public debate, and some valuable criticism.

From the beginning both he and the Attorney-General had emphasized three things: (a) The Bill is designed to establish the principle that in relation to post-war reconstruction the Commonwealth Parliament should be invested by the people with a greater measure of power; (b) the Bill was not and is not definite or final in form or substance; (c) the main questions to be determined are, (i) is the Australian nation to have the means of planning to solve the problems of post-war reconstruction and of the carrying of such plan into effect? (ii) What means are required?

The Prime Minister further stated that after the closest consultation with the Attorney-General and the other Commonwealth Government representatives at this Convention they had come to the conclusion that they should make a great effort to obtain unanimity in achieving the main objective of the Bill which was to give sufficient authority to the Commonwealth Parliament to assume primary, though not exclusive, responsibility for the problem of post-war reconstruction. In that spirit the Attorney-General had re-examined all the objections which had been raised and had endeavoured to meet the most important of them. The

Attorney-General would therefore suggest amendments to the Bill, and he would now ask him to explain them. Dr. Evatt stated that the proposals were submitted to exhaustive analysis of the States and the Press, and in addition many hundreds of citizens had in response to his invitation made suggestions for the improvement of the Bill.

"Our supreme object," he averred, "was and is to demonstrate the absolute necessity of obtaining from the people additional powers for the Commonwealth Parliament to deal with post-war reconstruction. Subject to that the Government has felt that it was its duty to take careful note of constructive criticism with a view to the removal of objections and to the improvement of the proposal. Accordingly we are sustaining several objections which have been raised." "The first objection," continued the Attorney-General, "was that the Bill would extend the powers of the Commonwealth Parliament to all measures which in the declared opinion of Parliament would tend to achieve economic security and social justice. As was frankly pointed out to the House of Representatives, this would have resulted in Parliament's decision being unchallengeable as to the extent of the particular power. While there is nothing inherently objectionable in conferring legislative powers which are not subject to judicial review—that is the position both in the United Kingdom and New Zealand—we agree that the proposal is out of harmony with the essential principle that the High Court should be charged with interpreting the grant of power to the Commonwealth Parliament. Therefore, in the interests of Australia, we shall not press the point and the powers as we re-define them will still leave the High Court charged with the function of interpreting their scope and purport." "A second objection," Dr. Evatt continued, "was based on sub-s. 3 of the proposed s. 60A (i.e., the original Bill as tabled). That sub-section stated that all the new powers conferred on the Commonwealth Parliament might be exercised notwithstanding anything contained elsewhere in the Commonwealth Constitution or in any Constitution of the States. The main object of this sub-section was to deal with the anomalous position created in relation to the Commonwealth marketing and price-fixing legislation. Such legislation is greatly impeded by s. 92 of the Constitution providing for freedom of inter-State trade. For instance, it is well known that the section obstructs the effectual carrying out of compulsory marketing schemes for the benefit of the primary producer."

After discussion on the clauses dealing with the "four freedoms" and the utilization of officers of the State Governments, Dr. Evatt concluded: "I have now described the modification we propose to make in the original Bill. They represent a genuine attempt on the part of the Government to meet all reasonable objections that might have been raised.

"We are convinced that the people expect us all to delay no longer but to plan now for the period of post-war reconstruction. It is a fallacy to suggest that the Commonwealth is asking the States to surrender powers that belong to them. What is being proposed is further to enlarge the self-governing powers of the people of all the six States acting in their capacity as people of the Commonwealth.

"This principle is made clear in the preamble to the Commonwealth Constitution Act itself, which declares that it is the people who, 'humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown and under the Constitution.'"

Dr. Evatt then tabled for the consideration of the Convention a new Bill in draft to take the place of the Bill originally tabled in the House of Representatives.

The new draft Bill differs from the original Bill as tabled in several important aspects,

For instance, it was made solely a post-war reconstruction measure. There was no reference as to the "carrying into effect the war aims and objects of

Australia as one of the United Nations, including the attainment of economic security and social justice in the post-war world."

There was no mention too in the paragraphs specifically set forth in the first Bill, viz., carrying into effect the guarantee of the four freedoms, that is to say: (i) freedom of speech and expression; (ii) religious freedom; (iii) freedom from want; and (iv) freedom from fear. But in place of these "four freedoms" the new Draft specifically referred both in its title and preamble to "guaranteeing religious freedom and freedom of expression."

These clauses were no doubt drafted after consideration of Article I (being addition to the Constitution of the United States of America) as follows:—

"Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

But the main objection to the first draft, namely, that without limiting the generality of the foregoing sub-section (i.e. in relation to war aims, economic security and social justice, and post-war reconstruction) it is hereby declared that the power of the Parliament shall extend to all measures which in the *declared opinion* of the Parliament will tend to achieve economic security and social justice . . . was removed from the context of the Bill. In other words, the declaratory power of Parliament was removed.

The Bill then had for its purport generally the removal of the main objections which were particularly stressed by the Queensland Government⁷ and its Parliament in its session in November, 1942, on the discussion of the proposals as indicated in the first tabled Bill.

Briefly these objections may be summarized:—

1. The making of the first Bill (i.e. Clause 60A) dominant not only of the original Constitution, but of the Constitutions of the States.

2. The granting to the Commonwealth Parliament of the day of what may be styled "an unlimited charter" to legislate on whatever subject it chose, without regard to State legislatures, and brushing aside any notion of the Federal Compact, namely, a Federal Constitution composed of equals (Commonwealth and State) in sovereignty.

3. The absolute power of Parliament itself to declare that any Bill brought in, in its opinion tending to achieve economic security and social justice, was to be the law, anything in the Constitution of the Commonwealth or of the States to the contrary notwithstanding; and concomitantly,

4. The removal from the jurisdiction of the High Court of any power of that Court to declare the constitutionality or otherwise of the measure concerned.

Turning to an examination of the new Bill, it will be observed that it lays down 60A (1) that the Parliament of the Commonwealth shall have power to make laws for the peace, order and good government of the Commonwealth, for the purpose of post-war reconstruction. It then proceeded (2): It is hereby declared, without limiting the generality of the preceding sub-section, that the Parliament shall have power to make laws with respect to (here are set out 12 paragraphs in the main similar in principle to those contained in the first draft tabled Bill). There were several minor alterations in the list, but these need not be mentioned in detail at this juncture. There was however a decided attempt on the part of the Commonwealth in this new draft to recognize the States, as sub-clause 4 of clause 60A provided that "The Parliament of the Commonwealth may make laws authorizing any State or any Minister officer or instrumentality of a State, or any local authority constituted under a law of a State, to assist in the execution of any power conferred on the Parliament by this section." This proposed clause was a decided improvement

⁷ *Queensland Parliamentary Debates*, 1942, pp. 810, 811, 874, 957.

on the 4 Commonwealth Measures dealing with the Commonwealth Uniform Taxation Scheme (referred to previously), for in the Commonwealth (War Time Arrangements) Act already quoted, there was distinct power given to the Commonwealth by a notice to regiment State officials for temporary transference to the Commonwealth and also for the Commonwealth to demand possession of State office accommodation, furniture and records.

The proposal then to utilize State instrumentalities by the Commonwealth showed a desire on the part of the Commonwealth to recognize the States in this direction as co-helpers at least in the work of post-war reconstruction.

The Prime Minister suggested an adjournment until the afternoon of the following day (November 25, 1942) to enable members of the Convention to digest the new proposals and to compare them with the first far-reaching Measure.

It was generally admitted that the new Draft as compared with the first Draft removed several of the objectionable features of the latter. Yet a close scrutiny of the new proposals indicated that legally they were somewhat indefinite. It was considered that the new Draft would give to the Federal Parliament absolute jurisdiction in making laws as it deemed fit "for the peace, order and good government of the Commonwealth, for the purposes of post-war reconstruction." In other words, it was considered that once the Parliament of the day made up its mind to pass a certain law for "post-war reconstruction," the High Court probably would have no jurisdiction to declare its constitutionality or otherwise, as such a Bill would still be declaratory in essence, and probably would be held by the High Court to be purely a political question and not one of law. That opinion, however, was expressed before the High Court delivered its judgment in the Victorian "Holidays" case (above mentioned), and it would seem on a consideration of that judgment that this fear was not well grounded, as the High Court would probably have jurisdiction to decide whether or not such a Bill was for the purpose of post-war reconstruction, as evidently it can now definitely inquire whether or not a Bill is within the defence powers. This at all events seems to be the result of this recent Court judgment. It can as interpreters of the Constitution look at the substance of the Bill itself. On the other hand, reading sub-clause 2, which states "It is hereby declared, without limiting the generality of the preceding sub-section, that the Parliament shall have power to make laws with respect to" (then follow the specific items), it was submitted that these specific powers were in no way dependent upon the wide grant of power for the purpose of post-war reconstruction in sub-clause 1, but were an additional power.

The general debate by the Convention on the new proposals commenced on the afternoon of November 25. Members of the Federal Opposition averred, *inter alia*, that the Bill was an attempt to enact the policy of the Australian Labour Party, and also argued that while the new Bill on the face of it was more satisfactory as not being so incomprehensible and far-reaching in its ambit, yet opposed the Bill on the grounds of indefiniteness and danger in its probable legal interpretation; or, in other words, while the Bill was limited to post-war reconstruction (a term not defined in the Bill), the Bill, in the final analysis, seemed to be the "old proposal dressed up in a new garment." Objection also was taken that it was considered that the present time was not a suitable one for holding a referendum.

Eventually the Leader of the Opposition (Rt. Hon. A. W. Fadden) moved the following motion:—

"That while this Convention recognizes the need to confer increased powers upon the Commonwealth it is of opinion that the war pre-occupation of many hundreds of thousands of Australians (including those in the fighting services and prisoners of war) who have a vital interest in improved post-war conditions and a right to an informed vote, renders it impracticable to secure a deliberate

judgment on the complex problem of such a fundamental change in the whole system of Government in Australia as is proposed. Accordingly it expresses the view that:

(a) the war powers of the Commonwealth being very extensive, advantage should be taken of the opportunity during the war of securing practical experience in co-operative Commonwealth and State action in relation to social and economic questions—so that in due course specific constitutional changes may be made with the greatest possible knowledge.

(b) the consideration of what changes should be made in the Commonwealth Constitution to meet new circumstances should at the appropriate date be referred to an elective convention representative of the people."

In the course of the debate a question was asked whether the Commonwealth was seeking complete legislative power, and replying in the negative the Attorney-General stated that if the draft Bill did give power beyond what the Commonwealth needed it was the task of the Committee to put it into proper form. Dr. Evatt also stressed that all the ordinary functions of the States, except so far as they are dealt with in the Bill, remain. The Commonwealth does not desire to do more than to give the Commonwealth Parliament the power to deal with those post-war problems that are truly national.

After the Rt. Hon. W. M. Hughes had referred to a course of procedure in 1915 (when he withdrew the writ for holding referenda on certain Constitutional Alteration Bills on the undertaking of the States to pass the necessary reference legislation, and which will be referred to later), he supported the motion of the Leader of the Opposition to the effect that the present was no time to distract the attention of the people with a referendum. Mr. Hughes also stressed that the Commonwealth had the powers and will retain all the powers necessary for at least eighteen months after hostilities cease. He also expressed the hope that some way would be found by which the matter could be dealt with, and suggested a grant of powers by the States. The Premier of New South Wales, the Hon. W. J. McKell, M.L.A., instanced that while New South Wales itself was preparing plans for post-war reconstruction he did not for a moment suggest that any plans that they could prepare in their State with their limited authority and limited powers were going to meet the problem of post-war reconstruction in the future, that one authority and one authority only could formulate adequate plans for post-war reconstruction, and that was the Parliament of the Commonwealth. It was urgently necessary that that authority should have sufficient power, and that is why he believed the Bill should be accepted. He pointed out that the delay which would occur if Convention accepted the motion of the Leader of the Opposition, and pointed out that Convention was there for the purpose of doing something constructive for Australia.

The Premier of Queensland (Hon. F. A. Cooper, M.L.A.) stressed the fundamentals of the Federation, and the need for growing together rather than growing apart, which was a tendency shown on the part of the Australian colonies prior to Federation, namely, a drifting into a system of national barriers. To bring about "a nation for a continent and a continent for a nation" (a need aptly expressed by the late Sir Henry Parkes) a federation was entered into, the cardinal principle being that the States should preserve their identity and not lose it. Hence in those things which apply to the Continent for the Nation and for those things which apply to the Nation for the Continent, the Australian people were one and indivisible. In those things which were the peculiar province of the component parts of the Nation (i.e. the States) they must be self-reliant yet neighbourly. In referring to the new proposed Bill, the Premier admitted that it dispelled some of the States' objections and some of its fears. The main root of the proposal, he considered, was to avoid the stupidity and malreconstruction following the war 1914-1918 and its aftermath. Without

regulation, orderliness and a defined plan there must be constant disruption and little progress, because so much time was wasted in overcoming calamities which could have been foreseen.

"Our lack of plan," continued Mr. Cooper, "after the last war led us into a morass. We know the preparation of a plan built Germany up into becoming an aggressor nation of immense power. We also know that a definite plan has given Russia a stability which has enabled her to resist a tremendous onslaught. Post-war reconstruction must be a plan—not necessarily the whole plan, but part of it. We must have a foundation to build upon or an example to follow. We had to plan hastily for the war; it was undoubtedly rough and ready, full of inequalities and errors, yet it was the germ of a plan which in the end will give us the victory." After welcoming the Conference as a step in the inauguration of a defined plan, Mr. Cooper referred particularly to the draft Bill, and instanced where certain legal doubts levelled at the measure could easily be remedied. For instance, he suggested that the Bill could be limited in operation for a prescribed period, setting out that Parliament for the purposes of post-war reconstruction could be entrusted with the making of laws for specific objects to be enumerated therein. Also it could be definite that the High Court would have jurisdiction as to the constitutionality of a measure brought in under the powers, or whether it was within the scope of the power for the purpose of post-war reconstruction.

"My desire," he continued, "is to place post-war reconstruction and planning and all plans which must follow and which have for their objective the rehabilitation and the reorganization of our lives upon a foundation which will attain the end laid down in the Atlantic Charter—the object of securing for all improved labour standards, economic advancement and social security. I see in the proposals certain spheres of action—some wholly Commonwealth, some concurrently Commonwealth and State, and possibly some wholly State.

"There is a magnificent field for full, earnest and hearty co-operation between Commonwealth and States; without which co-operation these plans must fail." Mr. Cooper stressed that the great desire should be to give to the people of Australia something that they will understand, some plan which will be evident to them what is intended to be built up; for after all the power in the final analysis rests with the people. The Premier concluded that Conference must do something, and that he could not possibly be a party to abandoning this attempt to do something for the people of Australia. He intended to vote for the "second reading" of the new Draft Bill, but would move in "committee" amendments which he considered would make it of greater advantage to the people of Australia and therefore acceptable to them.

The Premier of Tasmania, Hon. R. Cosgrove, M.L.A., who addressed Convention after the Premier of Queensland, moved a motion (slightly amended later) in the following form:

"That all words after 'that' (in the motion of the Leader of the Opposition) be deleted with a view to inserting in lieu thereof the following words:—
'this Conference is of opinion that:

'(a) Adequate powers to make laws in relation to post-war reconstruction should be conferred on the Parliament of the Commonwealth;

'(b)-It is undesirable that permanent alterations of the Constitution should be effected at this critical stage in Australia's history;

'(c) For this reason, legislative power with respect to suitable additional matters in relation to post-war reconstruction should be referred to the Parliament of the Commonwealth by the Parliaments of the States under Section 51 (xxxvii) of the Constitution;

'(d) Such reference should be for a period of seven years from the cessation of hostilities and should not be revoked during that period;

'(e) At the end of such period of seven years, or at an earlier date, a

referendum should be held to secure the approval of the electors to the alterations of the Constitution on a permanent basis."

The debate was continued on the new Draft Bill and the two motions. On November 30 the Prime Minister intimated to Convention that there seemed to be a consensus of opinion favourable to Mr. Cosgrove's amendment. "The Commonwealth Government's representatives were willing," Mr. Curtin continued, "to accept Mr. Cosgrove's amendment, because it is aimed at immediate action for the purpose of conferring upon the Parliament of the Commonwealth adequate powers to make laws in relation to post-war reconstruction. The opinion of the Government is that it is important to take action without delay. This opinion is reinforced by last week's decision of the High Court, which places important limits even upon the Commonwealth's defence power in time of war." (The judgment indicated is the case *State of Victoria and Attorney-General for the State of Victoria v. the Commonwealth of Australia* (already referred to at length, *supra*).)

The Prime Minister continued: "I have stated that the real issues before the Convention are as follows:—

"1. (a) Is the Convention in favour of increased Commonwealth powers for post-war reconstruction? (b) If the answer is 'Yes,' what powers should be granted?

"2. To give effect to the foregoing, what measures should be adopted, viz.:

(a) Referendum, involving Commonwealth legislation.

(b) Reference, involving State legislation.

(c) Postponement.

"It now appears that the Convention favours granting increased Commonwealth powers for post-war reconstruction. The immediate questions which arise are:—

(1) the extent of the additional powers to be granted;

(2) the method by which they are to be granted; and

(3) the period of the grant.

"The Government's first proposal was that it is desirable to consult the people of the Commonwealth, including all those on active service, in accordance with the procedure of s. 128 of the Constitution. In the past the procedure of reference under s. 51 (xxxvii) of the Constitution proposed by Mr. Cosgrove in his amendment has not proved satisfactory. During the last war Mr. Hughes (then Prime Minister) withdrew referendum proposals to alter the Commonwealth Constitution with a view to the State Parliaments referring certain matters to the Commonwealth in pursuance of s. 51 (xxxvii). Only one of the State Parliaments passed the necessary legislation. A somewhat similar fiasco occurred in 1920 in relation to the question of civil aviation. These experiences suggested the danger of relying upon reference of powers under s. 51 (xxxvii)."

Mr. Curtin continued:

"Further it is necessary, as Mr. Cosgrove's motion itself asserts, that if the powers are granted for a definite period they should not be revoked during that period. In the circumstances his Government is willing to attempt the procedure recommended by Mr. Cosgrove subject to the following: (1) The powers to be granted should be adequate to the needs of the post-war reconstruction period. (2) The period of the grant must be sufficiently long. The Government regards the period mentioned in Mr. Cosgrove's amendment as adequate. (3) Provision should be made to make any revocation of the grant impossible without the approval of the electors of the particular State. (4) This Convention should proceed to recommend the powers to be granted and consider a draft Bill with the assistance of a drafting committee to be appointed forthwith. (5) While it is recognized that the Premiers and Leaders of the Opposition representing the six States cannot bind the legislatures of their respective States, it is possible for them to agree to do their utmost to pass the draft Bill into law.

(6) The draft Bill should be passed into law within a reasonably short period."

"... Although the Commonwealth Government considers the method of referendum preferable to that of reference, it is willing that the alternative method of reference made permissible by the Constitution should be tried. The fact that the method failed on two previous occasions does not necessarily mean that it will fail during the present crisis, particularly in view of the consensus of opinion here that additional Commonwealth powers in relation to post-war reconstruction are essential."

Subsequently Convention unanimously agreed to the motion moved by Mr. Cosgrove, with an alteration that the reference period of legislative powers from the States to the Commonwealth should be for a period of not less than five years and not more than seven years from the cessation of hostilities.

On the motion of the Prime Minister a drafting committee was constituted consisting of the Attorney-General (Dr. Evatt), the Right Hon. W. M. Hughes, and the Premiers of the six States. The Commonwealth Solicitor-General, Sir George Knowles, acted as Secretary to the Committee. Sir Robert Garran, G.C.M.G., K.C., and Professor H. M. Bailey also assisted the Convention in its deliberations.

Accompanying the State Premiers were E. B. Cahalan, B.A., LL.B., Parliamentary Draftsman of New South Wales; F. G. Menzies, LL.B., Crown Solicitor of Victoria, and E. G. Normand, M.M., LL.B., Parliamentary Draftsman of Victoria; H. J. H. Henchman, Solicitor-General of Queensland, and J. E. Broadbent, I.S.O., B.A., Parliamentary Counsel and Draftsman of Queensland; A. J. Hannan, M.L., LL.B., K.C., Crown Solicitor and Solicitor for Railways of South Australia; J. L. Walker, B.A. (Oxon.), K.C., Solicitor-General and Senior Parliamentary Draftsman of West Australia, and R. G. Osborne, Parliamentary Draftsman of Tasmania.

In addition to Dr. Evatt and the Right Hon. W. M. Hughes, the legal profession was also represented in the Convention itself by the Right Hon. R. G. Menzies, K.C., the Hon. W. J. McKell, Mr. A. F. Watts (W.A.), and Hon. H. S. Baker, D.S.O., LL.M.

The Drafting Committee sat in camera on November 30 and December 1. On the evening of that day a draft Bill was submitted to the legal sub-committee, which committee made various suggestions for amendment. After these were considered by the Drafting Committee, the report of that body, together with the final draft Bill, was presented by Dr. Evatt to full Convention.

Dr. Evatt in presenting the report stated he was glad to report that the recommendations of the Drafting Committee to Convention were unanimous. "This," he added, "has not been possible without a spirit of 'give and take' which is so essential if these great constitutional issues are to be dealt with in the interest of Australia as a whole."

The Attorney-General mentioned that in regard to the period of the grant of power the Committee recommended that same be fixed at five years from the termination of hostilities. On the other hand, the reference of powers by the State legislatures is to operate as soon as the Bills are passed by the respective State legislatures.

Dr. Evatt continued: "There are fourteen matters which are to be referred. If dispute arises the interpretation of each of these matters would be one for the High Court. I think that the matters are clearly expressed, and, for myself, I shall not venture to elaborate or interpret. However, it will be obvious from a perusal of the list that close co-operation between the Commonwealth authorities on the one hand and the State and local governing authorities on the other is not only permitted but enjoined by the arrangement.

"The arrangement for co-operation is recited in the preamble of the draft Bill. It states that the Commonwealth has agreed that, as far as reasonably practicable, State Governments and their instrumentalities will be used to assist the Commonwealth in the execution of legislation passed under any of

the powers granted to the Commonwealth in relation to the matters referred.

"Mr. Cosgrove's motion provided that the powers granted should not be revocable during the agreed term. The most practical method of giving effect to this principle is the provision in clause 4 of the Bill that no repeal or amendment of the Bill conferring the powers can be effected without the approval of the electors of the particular State.

"The State Premiers have agreed that each of them will do his utmost to secure the passage of the Bill into law as early as possible, and that in any event he will introduce the Bill not later than January 31, 1943."

Dr. Evatt concluded that the Committee recommends that the Convention approve of the following draft Bill, which was duly tabled for consideration.

It may be well at this juncture to set out in full the provisions of this important draft Bill.

It is entitled "A Bill for an Act to refer certain matters to the Parliament of the Commonwealth until the expiration of five years after Australia ceases to be engaged in hostilities in the present war:"

Preamble.

WHEREAS it is enacted by the Constitution of the Commonwealth of Australia that the Parliament of the Commonwealth shall subject to the Constitution have power to make laws for the peace order and good government of the Commonwealth with respect to matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

And WHEREAS at a Convention of representatives of the Commonwealth Government and of His Majesty's Opposition in the Parliament of the Commonwealth, and the Premiers and Leaders of the Opposition in the several States, which was convened to meet at Canberra on the twenty-fourth day of November One thousand nine hundred and forty-two, it was unanimously resolved that adequate powers to make laws in relation to post-war reconstruction should be referred to the Parliament of the Commonwealth by the Parliaments of the States;

And WHEREAS it was further resolved that the reference should be for a period ending at the expiration of five years after Australia ceases to be engaged in hostilities in the present war;

And WHEREAS it was also resolved that it was desirable that the reference should not be revoked during that period;

And WHEREAS the Premiers of the several States have agreed to do their utmost to secure the passage through their respective Parliaments, as early as possible, of a Bill in this form, and in any event to introduce the Bill before the thirty-first day of January One thousand nine hundred and forty-three;

And WHEREAS it was also agreed that in the execution of laws made by the Parliament of the Commonwealth with respect to matters referred to it by section two of this Act, the Commonwealth should, so far as might be reasonably practicable, avail itself of the assistance of the States and their officers, authorities and instrumentalities, and, with the consent of the Governor in Council, of any authority constituted under a law of a State:

Be it therefore enacted by—

Short Title.—This Act may be cited as the Commonwealth Powers Act, 1942.

Reference of Matters to Parliament of the Commonwealth.

2. The following matters are hereby referred to the Parliament of the Commonwealth, that is to say: (a) the reinstatement and advancement of those who have been members of the fighting services of the Commonwealth during the war and the advancement of the dependants of those members who have

died or been disabled as a consequence of the war; (b) employment and unemployment; (c) organized marketing of commodities; (d) uniform company legislation; (e) trusts, combines and monopolies; (f) profiteering and prices (but not including prices or rates charged by State or semi-governmental or local governing bodies for goods or services); (g) the production (other than primary production) and distribution of goods, and, with the consent of the Governor in Council, primary production, but so that no law made under this paragraph shall discriminate between States or parts of States; (h) the control of overseas exchange and overseas investment; and the regulation of the raising of money in accordance with such plans as are approved by a majority of members of the Australian Loan Council; (i) air transport; (j) uniformity of railway gauges; (k) national works, but so that the consent of the Governor in Council shall be obtained in each case before the work is undertaken and that the work shall be carried out in co-operation with the State; (l) national health in co-operation with the State; (m) family allowances; and (n) the people of the aboriginal race.

Act not to be Repealed or Amended without Approval of Electors.

3. (1) This Act shall not be repealed or amended except in the manner provided in this section.

(2) A Bill for repealing or amending this Act shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.

(3) On a day to be appointed by the Governor in Council, but not sooner than three months after the passage of the Bill, through both Houses of the Legislature, the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly.

(4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature provides.

(5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent.

Duration of Act.

4. This Act, and the reference made by this Act, shall commence on a date upon which it is assented to, and shall continue in force for a period ending at the expiration of five years after Australia ceases to be engaged in hostilities in the present war; and no law made by the Parliament of the Commonwealth with respect to matters referred to it by this Act shall continue to have any force or effect, by virtue of this Act or the reference made by this Act, after the expiration of that period.

Dr. Evatt, in moving that the report of the Committee recommending the approval of the draft Bill be adopted, stated that the Bill submitted accorded with the unanimous view of the Committee. The Right Hon. W. M. Hughes, in seconding that motion, stated that men holding such widely divergent views on highly controversial questions should have been able to reach agreement would, he was very sure, have great weight with the Convention, and would, he hoped and believed, satisfy delegates that the powers proposed to be conferred on the Commonwealth by the States under par. (xxxvii) of s. 51 of the Commonwealth Constitution were at once adequate to a post-war reconstruction policy, and yet were so clearly defined and limited as to remove those grave doubts expressed during the discussion of the Attorney-General's Bills that under cover of a post-war reconstruction policy the basic principles of the Federal Pact could be utterly destroyed. The draft Bill provided for the maximum co-operation of States and Commonwealth, and conferred powers which he firmly believed would enable the Commonwealth to deal effectively with the vastly complex problems with which Australia would be confronted after the war.

To diverge for a moment, the course adopted by this Convention followed in the main the decision arrived at by a Conference of Commonwealth and

State Ministers held in November, 1915, during the last war. That conference, however, was wanting in what may be called "political representation." Its personnel differed from the present Convention in that the latter was representative not only of the Senate and the House of Representatives (including Government and Opposition members), but also of the States (including both Government and Opposition members). This present Convention therefore gave an opportunity for the maximum part of the people through its representatives to be heard. The Conference of 1915, too, was held after certain Bills altering the Constitution had been passed by the Federal Parliament, and the decision thereof necessitated a special Commonwealth Act, No. 51 of 1915, to provide for the withdrawal of writs issued by the Governor-General for the submission of certain proposed laws to the electors. The Commonwealth on that occasion performed its part. With the exemption, however, of New South Wales, the States failed to pass the necessary legislation. In Queensland, for instance, the Bill introduced by the Government of the day "to refer certain matters to the Parliament of the Commonwealth for the duration of the present war and for a period of twelve months after the conclusion of peace" failed to pass the Queensland Legislative Council of the day. In passing, the failure of the Legislative Council to pass the Bill was specifically mentioned by the then Premier and Chief Secretary (Hon. E. G. Theodore) in his Memorandum dated December 1, 1921, being his Memorandum in reply to a Memorial and Petition urging that the Royal Assent be not given on the Bill passed in the session of 1921 to amend the Constitution of Queensland by abolishing the Legislative Council (see "Correspondence respecting the Reserved Bill for the Abolition of the Legislative Council"—papers presented to the Imperial Parliament, April, 1922, Cmd. 1629).

The debate in the Queensland Parliament on November 11, 1915 (*Hansard*, vol. cxxi, 1915-16, p. 2000) will also indicate on a perusal of the introductory speech of the then Premier, the late Hon. T. J. Ryan, K.C., that there was some doubt as to whether powers could be so transferred by the States for a limited time only. The resolution of the Conference of 1915 (*inter alia*) set forth that: "With a view to removing any doubt as to power of the State Parliament under section 51, sub-section (xxxvii) to refer any matter for a limited time only, an Act of Parliament Imperial to be sought if necessary to make that power clear and to ratify what has been done under it."

Under the present Bill as approved by Convention there will also be a limited duration of the reference. The question as to the legality or otherwise of a grant of powers for limited periods was not discussed. If, of course, the question did arise, it could be no doubt easily rectified by a short Imperial Measure, as suggested in the Conference of 1915.

As will be observed later, however, the question as to the power of the States to make a reference of powers limited in time was the subject of legal discussion after Convention arose, and in fact caused amendments to be made in the Commonwealth Powers Bill of certain States in that direction.

In regard to clause 3, "Act not to be repealed or amended without the approval of electors": The principle for this clause will be found in the Constitution (Legislative Council) Amendment Act of 1929 of New South Wales (No. 28, 1929). This measure provided that the Legislative Council shall not be abolished unless a Bill for that purpose has been approved by the electors on a referendum. Queensland followed the principle inversely by passing its Constitution Act Amendment Act of 1934 (24 Geo. V., No. 35), providing that the Legislative Council or other similar body shall not be restored or constituted, nor shall the duration of the Legislative Assembly be extended, unless or until a referendum of electors of the State shall so approve in either case.

As to whether a legislature of a State can so legislate to limit the hands of its successors, it would be apt to quote from "The King and His Dominion Governors" (Dr. H. V. Evatt) at page 307:—

"In the case of those States and Colonies to which the Colonial Laws Validity Act, 1865 (28 and 29 Vic., c. 63) extends, the general answer to the question of restrictions upon the legislature's power is to be found in the decision of the Privy Council in *Attorney-General for New South Wales v. Trethowan* (1932 A.C. 526). There it was held that a law passed by the Parliament of New South Wales, which required the approval of the electorate at a referendum (1) to any Bill abolishing the Legislative Council and (2) to any Bill repealing the law containing the requirement of a referendum was valid and effective by reason of s. 5 of the Colonial Laws Validity Act

"That section, whilst committing to the Legislature for the time being full power to alter its own constitution, adds a proviso that laws so passed 'shall have been passed in such a manner and form as may from time to time be required by any Act of Parliament, letters patent, order in Council, or Colonial Law for the time being in force in the said Colony.'

"The conclusion was reached by holding that the laws in question constituted a 'manner and form' of passing laws, and that this requirement, being that of a 'Colonial law . . . in force,' had to be observed. The decision of the Privy Council has been availed of by the now uni-cameral Legislature of Queensland, which has passed constitutional amendments requiring popular approval at a referendum *before* an Upper House can again be reconstituted. Further, such popular approval is now also required in Queensland before the Legislature can lawfully extend its own life. In all these cases the supremacy of the Imperial Law contained in the Colonial Laws Validity Act made it unnecessary to determine whether upon general principles of constitutional law one legislature could bind its successor."

As to the nature of the powers: The powers are referred pursuant to placitum (xxxvii) of section 51 of the Constitution, which provides that:—

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose parliaments the matter is referred, or which afterwards adopt the law."

(The above provisions are contained in the first paragraph of the Preamble to the Draft Reference Bill.)

Hence, as the referred powers are contained in placitum (xxxvii), i.e. the enabling placitum, which is of itself contained in s. 51 of the Constitution, any law made thereunder will be a law "subject to the Constitution," and hence subject to interpretation under the Constitution by the High Court in accordance with existing law. It may be noted in this instance that an objectionable feature (or at all events a feature objected to by many critics of the original Tabled Bill) is removed. The new transferred powers also will be in the nature of "concurrent" and not "exclusive" powers. The original Tabled Bill, in addition to taking the power, essentially declaratory (to quote, "the power of the Parliament shall extend to all measures which in the declared opinion of the Parliament will tend to achieve economic security and social justice"), practically gave an "exclusive" power to the Federal Parliament, by declaring that all the powers conferred upon it may be exercised notwithstanding anything contained elsewhere in the Constitution or in the Constitution of any State.

To illustrate the notion of what constitutes the essence of these powers—concurrent and exclusive—one may quote from page 12 of the "Report of the Royal Commission on the Constitution" appointed on August, 18, 1927, and furnishing its report on September 7, 1929, at pp. 6 to 12 (Commonwealth Parliamentary Papers, 1929, F. 1251).

"In replacing the system of separate colonies by a system of federated States the Constitution provided for the government of Australia as a whole.

"Henceforth the people of Australia and the people of its several States were to be governed in accordance with the Constitution as the fundamental law for both the Commonwealth and the States, though each State retained its own Constitution except so far as it was altered or controlled by the Constitution of the Commonwealth. As the States already had their own organs and powers of self-government the Constitution was primarily concerned with the organs and powers of the central government. The powers of the central government are often spoken of as the powers of the Commonwealth as distinguished from the powers of the States.

"The power to make laws in Australia is distributed between the Commonwealth and State Parliaments in accordance with the legislative compact made between the Commonwealth and the States (quoting *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd.*, 1914. A.C. 256; 17 C.L.R. 655). Selected or enumerated powers are vested in the Commonwealth Parliament and the residual powers remain with the State Parliaments (ss. 51, 52, 107 of the Constitution). Lists of the matters with respect to which the Commonwealth Parliament may make laws are set out in sections 51 and 52, but other sections also confer powers of legislation on the Commonwealth Parliament (e.g. as 76, 77, 78, 102 and 112).

"With respect to certain matters the Commonwealth Parliament only may make laws, and in regard to these matters it is said to have an exclusive power. With respect to certain other matters, either the Commonwealth Parliament or a State Parliament may make laws, and in regard to these matters they are said to have a 'concurrent power' (*Sugar Company's case*, 17 C.L.R. 653, and the *Engineers case*, 28 C.L.R. at p. 154).

"The distinction between the concurrent and exclusive powers of the Commonwealth Parliament does not limit its powers or affect the scope of its legislation.

"Matters within the concurrent powers are only left to the State Parliaments so long as the Commonwealth Parliament does not see fit to supersede or exclude State legislation.

"A State Parliament has, for instance, concurrent power to make laws with respect to marriage and divorce. It has been free to do this from the establishment of the Commonwealth, as the Commonwealth Parliament has not, except for the special purpose of the Matrimonial Causes (Expeditionary Forces) Act, 1919, legislated on these matters.

"The Commonwealth Parliament may at any time enter the field and indicate, expressly or impliedly, that its legislation is to be the only law within the field.

"It may at any time vacate a field, but so long as it occupies it, a State Parliament is excluded to the extent to which the field is covered by Commonwealth legislation.

"Any valid law of the Commonwealth has supremacy over a State law. Under s. 109, when a law of the State is inconsistent with a law of the Commonwealth, the latter prevails, and the former is, to the extent of the inconsistency, invalid.

"The most obvious application of this section is to laws within the concurrent field, but the section is not limited to such laws. It applies to every valid Commonwealth law (*Engineers case*, 28 C.L.R., at p. 158). Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. The vital question is whether a Commonwealth Act on its true construction is intended to cover the whole field. If it is so intended, the inconsistency is in giving effect to a State Act, because the Commonwealth legislation is intended to exclude State legislation (*Cowburn's case*, *Clyde Engineering Co. Ltd. v. Cowburn*, 37 C.L.R., 478, 479)."

Note.—This later case over-ruled *Australian Boot Trade Employees' Federa-*

tion v. Whybrow and Co. (10 C.L.R. 226) in part, i.e. as to what is the proper test of inconsistency.

As was pointed out by Dr. Evatt, the final authority on the interpretation in relation to the referred powers will be the High Court. Generally, however, it may be asserted that these transferred powers shall be made as if part of s. 51 of the Constitution, and hence subject to the Constitution in regard to any "constitutional guarantee, safeguards or prohibitions." And as in the case of legislative power where there is concurrent jurisdiction, both Commonwealth and States may legislate in the matter, subject always of course to the requirements of s. 109 as to the prevailing of the Commonwealth law over a State law when the law of the State is inconsistent with the Commonwealth law, and bearing in mind the tests of inconsistency as laid down in the cases afore cited.

There remains yet briefly to touch upon the matters referred by the States. These have already been set out in the draft Bill, *supra*.

It will be conceded that the great majority of the subjects are national in essence. It is anticipated that they will survive the test as laid down by Quick in "Legislative Powers of Commonwealth and States," at p. 309.

"To the Federal Parliament were assigned powers permitting legislation of a uniform character operative throughout the length and breadth of Australia.

"It was not intended that this Parliament should pass laws applicable to parts of Australia only. The power of dealing with local questions, the making of local differentiations in accordance with territorial differences and conditions were left to the States.

"The test of a Federal power is that—Will its exercise yield laws of general application suitable to every part of the Commonwealth and capable of application throughout the States?

"The fundamental distinction between a Federal and a State law is that the first must be universal and general in its application and the second applicable to local circumstances.

"A power that must be exercised differentially is not a Federal power and should be left to the States."

As to the specific powers—(a) reinstatement and advancement of those who have been members of the fighting services, etc. This power is decidedly national in character. It will not only deal with repatriation (a power in limited aspect assumed by the Commonwealth after the last great war) but will extend towards the general betterment of the classes of persons indicated. As to par (b), employment and unemployment, these terms are general and require to be so having in view the immense task of post-war reconstruction. The placing of people in employment or providing for their insurance against unemployment (matters, by the way, in which the State of Queensland has already legislated for in its State plans for war and reconstruction periods) are Australia-wide in substance. Organized marketing of commodities will no doubt to an extent follow, or at least utilize, the planned principles (but with a national scope) already laid down by the Queensland Primary Producers and Organized Marketing Acts, which have been a feature of the legislation of this State since 1922. Uniform company legislation is also desirable, and to quote from the Report of the Royal Commission on the Constitution, "the decision in the *Huddart Parker and Co. v. Moorehead*, 8 C.L.R. 330, wherein five Justices of the High Court agreed that the Commonwealth Parliament under placitum (xx) of s. 51 of the Constitution had no power to make laws with respect to the creation of corporations" "was one of the surprises of the Constitution, and a Bill prepared for a Commonwealth Act dealing with companies, prepared before the decision was announced, was subsequently abandoned." Legislation dealing with trusts, combines and monopolies is essentially national in sphere, and many attempts have been made by referenda to entrust the Commonwealth with powers in this regard.

Profiteering and prices constitute par (f). There is an exemption herein in

not including prices or rates charged by State or semi-governmental or local governing bodies for goods or services. This exemption is an example of the Federal Government's desire in the negotiations for unanimity at the Convention as being a direct recognition of States and State instrumentalities. Probably, however, both powers referred—namely, organized marketing and profiteering and prices—may suffer certain restrictions imposed by s. 92 of the Constitution, declaring that trade, commerce and intercourse among the States shall be absolutely free (a section clearly almost colloquially expressed but most difficult of interpretation). The referred Bill, however, could not affect this position, as s. 92 stands and is unaffected by the reference of powers.

Paragraph (g) transfers the power of the production (other than primary production) and distribution of goods, and with the consent of the Governor in Council, primary production, but so that no law made under the paragraph shall discriminate between States or parts of States. It will be noted here, too, that the States are recognized as sovereign entities, in that a State must consent before a transfer of any matter of primary production—say, for instance, the sugar industry—is transferred to the Commonwealth. S. 99 of the Constitution provides that the Commonwealth shall not by any law or regulation of trade, commerce or revenue give preference to one State or any part thereof over another State or any part thereof. S. 99 and an allied s. 117 of the Constitution, providing that a subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State, were, it was considered by some critics of the First Tabled Bill, in danger of being rendered nugatory, and concomitantly the safeguards so enacted of being destroyed, owing to the wide terms embraced in sub-clause 3 of the then proposed clause 60A. It was submitted that the absence of power preventing discrimination in legislation, which would be without appeal to the High Court (or any other Court, including the Privy Council, taking the Statute of Westminster Adoption Act of 1942 with the referenda proposals) might seriously prejudice a State, especially one far removed from the seat of Government; or that different laws or different conditions in the same law might operate, tending to insecurity among the States, disunity and results foreign to Federalism or the Federal Pact itself.

Paragraph (h) of the reference relates to the control of overseas exchange and overseas investment; and the regulation of the raising of money in accordance with such plans as are approved by a majority of members of the Australian Loan Council. This Council, it will be remembered, was established pursuant to the Financial Agreement made on December 12, 1927, between the Commonwealth and the States, which agreement was ratified by legislation in all the States and also by legislation of the Commonwealth. The agreement was also specifically brought under s. 105A of the Constitution (added after a referendum of electors and a majority of the States had approved of same), being Act No. 1 of 1929 of the Commonwealth (Constitution alteration (State Debts)), 1928, intitled an Act to alter the Constitution by inserting therein further provisions relating to the public debts of the States and the borrowing of money by the Commonwealth and the States. This is a further instance of Commonwealth and State co-operation in that under this Bill plans for the raising of money indicated in the paragraph will be approved by a majority of members of the Australian Loan Council. This Council consists of the Prime Minister of the Commonwealth (or representative in his absence) and the Premiers of each of the States (or representatives in their absence). For matters, however, dealt with under the Financial Agreement, the Commonwealth representative has two votes and a casting vote, each member representing the State having one vote. The new provision in respect of moneys to be raised under paragraph (h) will place both Commonwealth and States on an equality in voting power and the majority will decide.

As to air transport—(paragraph *i*). As far back as 1920 a Premiers' Conference on the motion of the then Prime Minister (the Right Hon. W. M. Hughes) carried a resolution that the States refer legislation dealing with aircraft control to the Parliament of the Commonwealth under placitum (xxxvii) of s. 51 of the Constitution. Tasmania and Queensland (Commonwealth Powers (Air Navigation) Act of 1921—not proclaimed) passed legislation on the lines of the Prime Minister's resolution, and Victoria and South Australia also passed Acts, but on somewhat different bases. In New South Wales and West Australia, bills were introduced into their respective Parliaments, but failed to pass. The Parliament of the Commonwealth in 1936 passed a law to amend s. 51 of the Constitution by adding to s. 51 (par. via air navigation and aircraft). However, on submission to the electors pursuant to s. 128 of the Constitution the Bill failed to receive the requisite majorities as laid down by that section. A Premiers' Conference of April, 1937, however, resolved that, owing to the necessity of uniform rules as to air navigation and aircraft, legislation should be introduced into each State applying the Commonwealth Air Navigation Regulations (made pursuant to the Commonwealth Air Navigation Act, 1920–1936) to air navigation and aircraft within the jurisdiction of the State. Queensland accordingly in 1937 passed the Air Navigation Act of 1937 (which repealed the former Act of 1921) and applied the Commonwealth Air Navigation to air navigation within Queensland “as if those regulations so applied were incorporated in this Act.” Air transport is essentially national in substance.

In regard to “(*j*) uniformity of railway gauges.”

It is a truism that disparity of railway gauges causes transport difficulties to the National war effort, and the Commonwealth will rightly have this power as being one of national or Australia-wide importance. It may be interesting to observe that a Premiers' Conference at Sydney in May, 1915, carried a resolution to the effect that, in its opinion, a Commission of two leading railway experts preferably from outside Australia should be forthwith appointed by the Governments of the Commonwealth and the mainland States to consider, report and advise upon the question of unifying the gauge of Australian Railways particularly as to the need for a uniform gauge (*b*) the most suitable gauge in the circumstances of existing and probable future development of Australia; (*c*) the best method of carrying out unification of gauge if deemed advisable; (*d*) what benefits will result (1) to the Commonwealth and (2) to each of the States (*e*) the probable cost of such unification.

Reference to Progress report No. 9. New South Wales Reports of Commonwealth and State Ministers, 1926, No. 7,391, presented by the Premier of New South Wales as Executive Officer of Premiers' Conferences, will indicate that considerable attention was given to and reports made on this question from May, 1920, to 1923.

Subsequently an agreement was arrived at on September 16, 1924, between the Prime Minister of the Commonwealth and the Premiers of New South Wales and Queensland as to the construction of a standard gauge railway from Kyogle in New South Wales to South Brisbane in Queensland. The preamble to the Queensland South Brisbane–Kyogle–Grafton Railway Agreement Acts, 1924 to 1926 (i.e., the Principal Act, 1924, 15 Geo. V. No. 10—see Public Acts of Queensland Reprint, 1828–1936, vol. 10, pp. 227 and 228 *et. seq.*) contains reference to Conferences of July 1, 1920, and the appointment of a Royal Commission by His Excellency the Governor-General on February 8, 1921, to inquire into the matters appertaining to unification of gauges of the Australian Railway systems, and the report of the Commissioners of September 22, 1921. This Act hence effected the same railway gauge from Brisbane to Albury—and has proved its usefulness in the present war.

As to paragraph (*k*) this deals with the reference of National works with a proviso to the effect that the consent of the Governor in Council of a State shall

be obtained in each case before the work is undertaken, and that the work shall be carried out in co-operation with the State. This is another instance of close Commonwealth and State co-operation in such national works, for instance, as irrigation, water conservation, soil protection and such other works essentially national in character. It may not be out of place in this regard to mention that, so far as the State of Queensland is concerned, a system of definite works co-ordination and planning was instituted by the Government under the Premiership of the Hon. W. Forgan Smith, LL.D., by the passage of the State Development and Public Works Co-ordination and Organisation Act of 1938. This measure marked an original departure amongst Australian Governments towards the goal of economic planning. In its broadest terms this legislation provides for the improvement of the general economic welfare of the State by the institution of an orderly planned system of public works and other projects intended for the development of the State. By this measure there is complete co-ordination between major works of a developmental character between the State itself and semi-governmental and local governing bodies. The principle of the 1938 Act, in fact, was a logical sequence of the principles of the Bureau of Industry Act of 1932 passed by the Forgan Smith Government in its first session in terms of a resolution of a Premiers' Conference held in June, 1932, when what is called the "Premiers' Plan of 1931" was reviewed. The resolution of that Conference was an affirmation of the Principles of the Premiers' Plan of 1931 and an undertaking to meet interest obligations and to continue to progressively reduce budgets and (in addition) to conduct a public policy with a view to reviving industry so as to restore normal employment to those of our citizens who had neither work nor wages (the addendum being carried on the motion of the then Premier of Queensland, the Hon. W. Forgan Smith, LL.D.). The soundness of the principles introduced in Queensland was also recognized in the subsequent appointment of a Commonwealth Co-ordinator General of Works and further by a Commonwealth and State arrangement of the performance of what may be called national works. The wisdom of this scheme of planned works organization was proved on the outbreak of the war when the change over from peace-time to war-time conditions was easily effected in the administration. Post-war reconstruction would demand a similar co-ordinated action on the part of Commonwealth and State, and this transfer of power will in effect be a continuation so far as major works are concerned with the principle obtaining in Queensland at the present time. As to paragraph (1) National health in co-operation with the State. This power again is essentially national in essence, and with full State co-operation and the full utilization of the advanced health and medical schemes already obtaining in this State, much good can be accomplished in the direction of medical research and special Australia-wide medical services. The limited powers under the Constitution as to health matters (mainly that of quarantine services) have retarded progress in major Australian health schemes.

As to paragraph (*m*) family allowances, the present Constitution has express powers (placitum xxxiii of s. 51) to enact in regard to invalid and old-age pensions, and this further grant of power will set aside any constitutional or legal doubt as to the power of the Commonwealth to enact laws dealing, for instance, with child endowment, widows' pensions and such other family aids as may be necessary having in view social security in the post-war world.

As to the last paragraph (*n*), placitum (xxvi) of s. 51 of the Constitution gives the Parliament of the Commonwealth power to make laws with respect to the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws. This new power will remove the exemption in the provision so far as the aborigines of Australia are concerned.

The Bill in its preamble sets forth that the Commonwealth should, so far as might be reasonably practicable, avail itself of the assistance of the States and

their officers, authorities and instrumentalities, and with the consent of the Governor in Council, of any authority constituted under a law of a State. This declaration in statutory form of full Commonwealth and State co-operation is an outstanding feature of the measure. Many States—and speaking for the State of Queensland in particular—have already given serious attention to post-war problems, and as a concrete instance the Co-ordination of Employment Facilities Act of 1941 of Queensland (6 Geo. VI, No. 8) may be cited. This measure sets out the establishment of a concrete plan by means of the co-ordination and collaboration as between governmental, semi-governmental and general community interests of the State conducive to the proper organization of the employment-placing agencies of the State for placing in employment the citizens of the State, including returned members of the Forces and munition and other war workers, with particular attention to juvenile workers, and also refers to collaboration with the Commonwealth in these matters. A State Employment Council, representative not only of the Minister (the Secretary for Labour and Employment—at present the Hon. T. A. Foley, M.L.A.) as Chairman, and Crown Officials—the Director of Employment, the Co-ordinator of Public Works, the Director of the Bureau of Industry and Government Statistician, and the Director-General of Education, but of employers' and workers' representatives, and a representative of returned sailors, soldiers and airmen, with a representative of the Brisbane City Council, has already been established, whose general duty will be to attain efficient co-ordination of employment-placing agencies (which is widely defined) with a view to effecting as far as possible the principle of the "right to work" for the citizens of this State. It is apparent, therefore, with full Commonwealth and State co-operation, the machinery set up by this important reconstruction Statute of this State will be of immense service to the Commonwealth as providing not only a basic scheme, but also an Instrumentality which may be availed of in light of what appears in the preamble to the Reference of Powers Bill.

Summarising

This Convention was the first of its kind since the inauguration of Federation on 1st January, 1901.

It showed a desire on the part of Convention to maintain the federal system of Government as contained in the Commonwealth Constitution Act.

It also showed that the existing Commonwealth Constitution was elastic enough and comprehensive enough to enable important post-war reconstruction problems to be the subject of legislation by the Commonwealth Parliament without the necessity for any amendment of the Constitution itself. It showed that when Commonwealth and State representatives composed of Statesmen, holding diverse political views, met for the common good, they were able to evolve a unanimous scheme for the common good.

Both Commonwealth and State representatives worked in the interest of the whole Australian nation and evolved a scheme founded on the same basis on which the Commonwealth itself was founded, namely, mutual co-operation, compromise, and agreement between partners, State and Commonwealth, on a basis of equality of sovereignty.

That as the Commonwealth Constitution was originally founded by the cesser from the States of powers deemed national and nation-wide in their essence, so in the present decision of Convention, the States themselves will cede certain powers deemed by Convention national and nation-wide.

That without any amendment of the Constitution and concomitant costly referendum campaigns, not only money, but valuable time has been saved to aid the present war effort, and the result has shown a dominance of the Constitution itself as a fundamental law.

The Bill will fix a testing period of five years after Australia ceases to be engaged in hostilities in the present war; this will enable the Commonwealth Parliament in the meantime to prove its responsibility in the use by it of its new

powers. The States, of course, have a responsibility in seeing that they pass the reference legislation. When this is done the States will be unable to repeal or amend the grant of power to the Commonwealth without a referendum of their own electors. This provision will ensure stability in the duration of the powers.

The Commonwealth will have to prove to the real rulers of Australia, and in whom in the final analysis the sovereignty lies—namely, the people of Australia—that it is competent enough and far-seeing enough to legislate for the several matters expressed in the grant.

Legislation can be passed by the Commonwealth under the new powers by Reference of Powers Bill as soon as any State shall pass its Reference Act, as so far as a State is concerned the reference by it takes effect on the date of its assent. The Commonwealth need not delay legislative action until all the States shall pass the Reference law, for under placitum (xxxvii) of s. 51 of the Constitution, the Parliament may make laws dealing with the reference when so referred by a single Parliament of a State or by Parliaments of States. The law made by the Parliament would, of course, by the Constitution itself, only extend to the State or States who passed the reference law, or to any State which afterwards adopted the law (Constitution s. 51 (xxxvii)).

If the Commonwealth proves worthy of the trust there should be no difficulty hereafter of making a permanent grant of the referred powers (or at least some of them) which no doubt would be effected by referendum under s. 128 of the Constitution. If the Commonwealth fails in its trust the ultimate decision will rest with the people. At all events, it is definitely laid down by clause 4 of the Reference Bill that the State Act shall continue in force for a period ending at the expiration of five years after Australia ceases to be engaged in hostilities in the present war, and further that no law made by the Parliament of the Commonwealth with respect to matters referred to it by this Act shall continue to have any force or effect by virtue of this Act or the reference made by this Act after the expiration of that period.*

Hence if there is no extension, the States themselves will resume the powers so referred; or if within the period any particular Commonwealth Parliament falls "down on its job," the electors can put another in its place.

On the good sense of the Commonwealth Government will depend the success of the present scheme, and on its responsibility shall lie the proving of its worth to govern as a national government, with wide and adequate powers, in the solution of the gigantic post-war reconstruction problems which demand attention now and without delay. With the mutual co-operation of its partners in the solution of these problems—the States—this responsibility should not be so burdensome. The utilization of State agencies is therefore essential to the success of this co-operative scheme of planned post-war reconstruction.

To the States then lies the duty of passing the necessary Bills through their respective Parliaments. To the Commonwealth then (in co-operation with the States) lies the duty of legislating in accordance with the new grant of power. Let each partner in the Federation proceed speedily in the interests and well-being of the Nation!

ADDENDUM*

The only States which have carried without amendment the necessary legislation to give effect to the resolution passed at the Constitutional Referendum Conference mentioned above are New South Wales and Queensland.

In the case of the other States, Victoria, South Australia, Western Australia and Tasmania, the bill was introduced to the respective Parliaments but failed to pass the Legislative Chambers in the form agreed upon at the Conference.

In the circumstances, the Federal Government has now decided that the extended constitutional powers embodied in the bill, to cover a period of five years after the war, are to be sought by means of an early referendum.

* Contributed by L. H. Pike, Esq., Agent-General for Queensland.

THE AMERICAN LAW INSTITUTE

[Contributed by W. DRAPER LEWIS, Esq.]

THE Institute was organized on February 23, 1923, at a meeting in Washington of some three hundred and fifty judges, lawyers and law teachers. Those present had come as the result of an invitation sent by a voluntary committee of some thirty-nine persons, the Chairman of the Committee being the late Elihu Root, the then leader of the American Bar.

For several years prior to the organization of the Institute there was not only among the public, but among the members of the legal profession itself considerable dissatisfaction with the administration of justice and a consciousness of the obligation which rests upon the profession to take positive action to better conditions. The formation of the committee of which Mr. Root was chairman was due to the recognition of these facts, the immediate cause of the organization of the committee being the action taken by the Association of American Law Schools at its meeting in Chicago, December, 1921. For several years that Association had under consideration the establishment of a juristic centre which would draw the attention of the law schools towards the improvement of the law and utilize the learning of their faculties to that end. Investigation convinced the Association that the success of the undertaking required the co-operation of all the organized forces of the profession, and they therefore appointed a committee to secure this necessary co-operation. At the invitation of a committee of the Association, Joseph H. Beale, the noted professor of law at Harvard University, was Chairman. On May 10, 1922, the Committee of which Mr. Root became Chairman was organized, with the object of establishing a Permanent Organization for the Improvement of the Law. The object of the meeting in Washington was to consider the form of organization recommended by Mr. Root's committee. Those attending therefore represented the legal profession in the best sense of that word.

The report of the committee not only suggested a form of organization, but the work which the Institute when organized immediately should undertake. The organization to-day remains substantially unchanged. There are two classes of members, one official members, and the other life members, though a great majority of the official members are also life members.

The official members are the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States, the senior judge of each United States Circuit Court of Appeals, the Attorney-General and Solicitor-General of the United States, the Chief Justice of the Court of Appeals of the District of Columbia, the Chief Justice of the highest court of each state, the President of the American Bar Association and the members of its Executive Committee, the President of each State Bar Association, the Dean of each school belonging to the Association of American Law Schools and the President of certain learned legal societies. The by-laws limit the number of life members to 800, and there is an elaborate process of investigation before election. In a general way it may be said that the requisites for membership are ability, a recognized professional position, and an instinct for public service.

The members elect a Council of thirty-four persons. The Council acts, not only as an executive body, but passes on all legal statements or recommendations for changes in law or its administration to be considered by the Annual Meeting. Indeed, this is its principal function, as it delegates all executive details to its Executive Committee.

The organization committee in its report recommended that the immediate work to be undertaken by the Institute should be a Restatement of the Law. This recommendation was based on the committee's belief that the two chief defects in our law were the uncertainty and complexity of our present common law; that is, the law which has developed from the decisions of our courts rather

than legislation. "These defects," they said in their report, "cause litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons as to their rights and when litigation is begun create delay and expense."

It must be hard for an Englishman living as he does under a unified court organization to realise the difficulty of ascertaining the case law in a country which has not only a system of Federal Courts but a separate system of courts in each of its forty-eight states. If each group of courts confined itself to its own decisions, while the common law would vary from state to state, it might obtain a considerable degree of certainty in any one state or in the Federal Courts. As a matter of fact, however, the decisions in one system of courts, as for instance the courts of the state of New York, have an influence on the decisions in other states; not a conclusive and decisive influence, but still an influence. Also our Federal Courts, especially the decisions of the Supreme Court of the United States, have very considerable influence on the decisions of our state courts. The necessity therefore for an orderly statement of what we may term the general common law of the United States was and is much greater in this country than in England.

The problem which confronted Mr. Root's committee was not only to recommend the orderly restatement of the general common law of the United States, but to secure an organization of such a character that its statements of law, while not having the compelling force of a statute, would have a very real effect on the decisions of the courts.

That the Restatement of the law though in the form of a Code should not have back of it legislative sanction was and is the opinion of the Institute. The Restatement is designed to preserve, not to destroy the common law system of adjusting law to the changing needs of life by the process of judicial application to the particular facts of the instant case the rules of law developed by prior decisions in analogous cases. The Restatement, therefore, was and is conceived not as an Procrustean bed to which all future decisions must conform but as a new starting point for judicial modification by exception. The necessity for some agency which could formulate a new starting point was and is essential in this country if the common law system of stating and developing law is not to be mired down in the morass of multitudinous conflicting precedent.

Nevertheless the novel character of the experiment which the Institute made in undertaking the Restatement and the possibility of failure were fully recognized. The law stated in the Restatement must be based on the decisions of the courts and yet have an independent and *prima facie* authority of its own. If it did not have this independent authority, if what the Institute produced was merely another legal text book, the work would hardly be worth doing. Therefore, at the outset it was determined to develop the sections of the Restatement together with comment and illustrations by the process of group discussion by experts on each subject, to whom the pertinent decisions were familiar. But while these experts must and do have before them the decisions of the courts of the forty-eight states and the decisions of the Federal Courts, the Restatement as published makes no reference to any decisions and contains no discussion of cases. The statements of law in the Restatement are made "on the authority of the Institute." It is manifest that the weight of the authority of the Institute depends on the confidence reposed by the profession and the courts in the Institute as an organization and in the Plan of Work followed in the development of statements of law, and this confidence must be continuously strengthened by the general recognition of the fact that the completed work is well done.

Has the Institute succeeded in its bold and novel undertaking? The degree of success to-day is far greater than any of us who founded the Institute and organized the work on the Restatement expected. The volumes of the Restatement are in constant use in courts and law offices. The steady and rapid increase in citations to it by courts, especially by courts of last resort, is marked. While it cannot be said that the Restatement is now universally

accepted as a prima facie and correct statement of the general common law of the United States, a disregard in a judicial opinion of any pertinent statement of law in the Restatement is increasingly exceptional.

It will be noted that I have used the expression "general common law of the United States." In one sense there is no such thing. Each state has its common law. There is no Federal common law. The Federal Courts interpret the Federal Constitution and Congressional statutes and also the common law of any state which the operative facts of the instant case make necessary. There is, however, a general common law of the United States in the sense that the same common law rule generally prevails in all the states. All the Restatement attempts to do is to express this law. But in each state the judge having a section of the Restatement applicable to the case before him, though he accepts the statement of law embodied in the Section as the general law of the United States, is obliged to check the statement with the statutes and the common law decisions of the state the law of which governs the case before him. He is aided in this task by what are known as "State Annotations to the Restatement," which are produced usually by State Bar Associations Committees, which set forth the decisions of their state and the state statutes bearing on the applicable section of the Restatement. The work of producing the State Annotations is necessarily a slow process, but there are already State Annotations in the larger states for most of the principal subjects now included in the published volumes of the Restatement.

The work on the Restatement began in the spring of 1923. Three subjects were undertaken, Conflict of Laws, Contracts and Torts. In the fall of that year the work on the law of Agency was begun. So far sixteen volumes of the Restatement have been published; Contracts, two volumes in 1932; Agency, two volumes in 1933; Conflict of Laws, one volume in 1934; Trusts, two volumes in 1935; Torts, four volumes in 1934-1939; Restitution, one volume in 1937; Property, the first three volumes in 1936-1940; Security (Pledges, Possessory Liens, Suretyship), one volume in 1941. A statement of the law of evidence was approved at the annual meeting in 1942. Work on the last two volumes of Property has been impeded by present conditions, but it is hoped to complete it for the meeting in 1944.

It is difficult to exaggerate the magnitude of the task. To hammer out by group discussion clear and correct statements of law is a slow process. The Plan of Work which we have been and are following involves the appointment of an Editorial Group composed of a Reporter and Advisers. The word Advisers is a misnomer: actually they are co-workers with the Reporter. The Reporter is responsible for the first preliminary drafts of the different parts of his subject; usually a preliminary draft covers with comments and illustrations some sixty or seventy pages. Copies of the draft are distributed to the members of the Group, who subsequently meet and work over the draft, the meeting, or as it is called Conference, usually lasting from three days to a week. The Reporter then revises the draft in the light of the conclusions reached by the Group, producing a second preliminary draft covering the same sections. This draft is in turn dissected by the Group. In the same manner successive drafts are produced until the members of the Group and I, as its Chairman, are satisfied that a draft has been produced sufficiently satisfactory to be submitted to the Council. The draft so submitted is discussed by the Council with the Reporter section by section. As amended, the draft, designated a "Tentative Draft," goes to the Annual Meeting of the Institute.

These Annual Meetings are always held in May, and usually last from four to five days. The meetings are attended by approximately seventy-five to eighty per cent. of the membership. Apart from the first session, which acts on reports and is usually addressed by the Chief Justice of the United States, all the sessions of the meeting are devoted to a discussion of the drafts submitted by the Council relating to the Restatement and other work on which the

Institute is engaged. After the discussion of a Tentative Draft it is returned to the appropriate editorial group. By the same process as that above described, the Group prepares a Revision. Ultimately the Revision is submitted to the Council, is discussed by them, and as they amend and approve it submitted by them to the Annual Meeting of members either as a Second Tentative Draft or as a Proposed Final Draft.

The final step in the development of the Restatement of any subject is the consideration of a Proposed Final Draft at an Annual Meeting. If the meeting amends the draft these amendments are submitted to the Council before the adjournment of the meeting so that differences can be ironed out before the meeting adjourns. Only if and when a draft is finally approved by both the Council and the Annual Meeting is it published as an official publication of the Institute.

The foregoing elaborate description of the process of the development of the Restatement of the law (and all other completed work of the Institute) makes understandable the amount of time and work involved. It shows why it is that it has already taken nearly twenty years and will take approximately two years more to complete those subjects of our common law which the Institute believes it is now possible usefully to restate.

Apart from the great need in the United States of an orderly statement of our existing general common law, the present writer feels that the degree of success attending the Restatement is due in large part to two factors resulting from the Plan of Group Work above described; one of these is the fact that a very considerable number of leading members of our bench and bar have taken part in the work, and therefore feel a responsibility for and pride in it; the other is that the development by group discussion results in a better final product than it would be possible for one man or one man merely with the advice of others to produce.

Of course group work, as elaborate as that undertaken and carried out by the Institute, would amount to nothing worth while unless the editorial groups on the results of whose labours the Council and the membership act were not composed of experts on several subjects, as well as being themselves generally recognized as leading students of the law. This has been made possible by the existence in the United States of faculties of law which have secured and retained in their service lawyers of outstanding ability. True, the editorial groups are composed of practising lawyers and judges as well as law teachers. But the Reporter is always a member of the faculty of a leading law school. Apart from those who as members of Law School Faculties give their whole time to teaching and research, it is rare to find anyone having the peculiar expert knowledge of the subject and the time requisite for the task of preparing the drafts which form the nuclei of the discussions of the group. Thus members of law faculties have carried the major part of the burden of the work on the Restatement, though it could not have been well done without the co-operation, as members of the different groups, of the experienced practitioner and the judge, perhaps I should say especially the judge.

The reward of the members of the editorial groups has been the professional recognition of the outstanding character of their services. Such men as Williston, Beale, Scott and Seavey of the Harvard Law Faculty, Bohlen of the University of Pennsylvania Law School, Powell and Hanna of the Columbia University, Bigelow of the University of Chicago, Rundell of the University of Wisconsin, and Frazier of the University of Minnesota, are among the recognized leaders of the profession, and that recognition is in no small part, though in varying degrees, due to their work on the Restatement.

It has been said that the Institute's Restatement of the law is the greatest legal work ever undertaken since Justinian. We can let posterity be the judge of that statement. But it is a fact that no work of this magnitude can be undertaken without large financial support. We in the United States are fortunate in having

large public Endowments and Foundations. One of the most widely known of these is the Carnegie Corporation. Their generous financial support has made the Restatement of the Law possible.

In what I have so far said about the Institute I have emphasized its work on the Restatement of the Law. That is as it should be. The Restatement is not only the first but it is by far the largest undertaking of the Institute. At the same time it would give a false impression if I did not here point out that the purpose of the Institute as expressed in its charter is the improvement of the law.

Since its organization the Institute has undertaken and completed a Model Code of Criminal Procedure and a Code of Evidence, the former in 1934 and the latter at the Annual Meeting in 1942. It has also completed a study of the problem of the proper treatment of the older adolescent group convicted of crime. The study has produced a Model Act known as the Youth Correction Authority Act. An Englishman will recognize on reading this Act the influence of his own Borstal system. The Act, as modified to meet local state conditions, has been adopted in California, and the action of that state may be followed by other states. The principal result of the work, however, is what may be termed the educational effect of the Institute's adoption of two rules embodied in the Model Act: namely, that a convicted youth should not be released until it is reasonably certain that he will not again commit a crime, and that he should be released when it is reasonably certain that he is harmless. The successful application of these rules necessitates a provision for an Authority charged with the duty of determining from time to time the treatment of the convicted youth and also the determination of the facts on which his release depends. Such an Authority is provided for in the Model Act. It will be noted that the two rules referred to substitute protection of society for punishment as the basic principle which should guide the sentencing, treatment, and release of criminals. Thus the Institute has committed itself to a revolution in the fundamental objects and methods of our penal system. Coming from an organization representing the leaders of the bar and bench in a country that has a crime problem rapidly amounting to a serious menace the action of the Institute may be of far-reaching importance.

Besides these things which the Institute has completed or nearly completed it has recently undertaken to do work on an International Bill of Rights and also on a Code of Commercial Law.

The work on an International Bill of Rights is being organized. It is for public education and for possible use in the peace settlement or post-war arrangements. Our preliminary investigation before we undertook the work indicates that we may reasonably expect to find a very considerable number of the Allied countries and those sympathetically neutral have similar ideas on basic individual rights and may agree on their expression. Therefore, the group which we are organizing we hope will be able to develop a draft of an International Bill of Rights. As a whole, the group is representative, not only of students of International Law and foreign affairs in the United States, but also of the different cultures of Europe and the Western Hemisphere as well as the Far East.

As to the Code of Commercial Law, work has already begun on the sections relating to Sales. For the last fifty years we have had in the United States an organization known as the Conference of Commissioners of Uniform State Laws. The Commissioners are appointed by the Governors of the several states either under a statute directing such an appointment or by voluntary action. They have drafted a very considerable number of what are known as uniform laws. Those relating to commercial matters have been successful in the sense that they have been adopted by a very considerable number of states. The Uniform Negotiable Act, for instance, is now in force in all states, while other of the Uniform Commercial Acts are in force in the majority of the states. Therefore, our Commercial Law is already largely statutory and to a considerable extent uniform. The Institute in desiring to undertake with the Commissioners a

Code of Commercial Law is following an increasing opinion that the next stage in the development of that law should be a Code which would be inclusive of Commercial Law subjects, there being further hope that work on such a Code may be an important step towards the ultimate adoption of an international Commercial Code. The present situation, however, is that the Institute, having funds sufficient to enable it to draft the sections of the code relating to Sales, is co-operating with the Commissioners on Uniform State Laws in drafting these sections.

I am sorry that circumstances have prevented me from doing more than add a mere footnote to this admirable account of the work of the American Law Institute by its able and accomplished Director.

It was my great privilege in May of 1942 to spend a week in Philadelphia attending the annual meeting of the Institute, and to see the actual work of the Institute being carried on. The devotion of the members of the Institute to the great work of restating the law was quite wonderful to see, and I came away with the greatest admiration for the work and the spirit which animates it.

The work of the Institute in restating the law is now recognized throughout the United States of America as a work of outstanding value; and that recognition is spreading to other countries where the system of law derives from the same source. By reason of a most generous gift made to the Library of the Royal Courts of Justice the Restatement of the Law is made available for English lawyers, Judges and Counsel alike.

I am glad to pay this small tribute, with which many would wish to be associated, to a masterly undertaking carried out with a noble zeal and fulfilling the highest tradition of the legal profession for sound learning and scholarship.

NORMAN BIRKETT.

LEGISLATION IN EXILE: BELGIUM

[Contributed by DR. HENRI FAYAT, *Avocat à la Cour d'Appel de Bruxelles, Chef de Cabinet to the Belgian Minister of the Interior.*]

ON May 10, 1940—as on August 4, 1914—but without even the warning of an ultimatum, Germany invaded Belgium.

On May 14, 1940, the Germans broke through the French defences at Sedan. They reached the sea at Boulogne some ten days later. The Allied front was cut in two. The epic of the Dunkirk retreat began. The isolated Belgian Army was compelled to capitulate.¹ Its Commander-in-Chief, King Léopold III, was made a prisoner of war.

On May 28, 1940, the situation was the following: the national territory was entirely occupied by the invaders, the King was in the power of the enemy, the Government (of whom four Ministers had stayed with the King until May 25, 1940) had established themselves abroad.

Constitutional Basis of Legislation.—The constitutional crisis thus arising was promptly and plainly dealt with.

A King in the power of the enemy is unable to reign.²

The King's inability is provided for by the Belgian Constitution under s. 82, which reads: "If the King is unable to reign, the Ministers, after having secured a statement about this inability, immediately summon Parliament."

By an order, dated Paris, May 28, 1940, the Ministers assembled in Council duly stated that the King, being in the power of the enemy, was unable to reign.

From that moment, since, owing to their members being dispersed, some in

¹ It was learned afterwards that the statement of the French Government relating to the capitulation of the Belgian Army was not wholly fair nor impartial as to the attitude of King Léopold III and the real causes of the Allied collapse in Flanders. See *Keyes v. Daily Mirror* (High Court of Justice, King's Bench Division, June 13th, 1941).

² Cf. *Vattel*, 1758, L. iv. ch. II, par. 13: A king, prisoner of war, cannot validly negotiate peace (quoted by G. Kaackenbeeck, *De la Guerre à la Paix*, Sirey, 1940, p. 42).

territory occupied by the enemy, some others abroad or with the Army, the Houses of Parliament could not be summoned either to appoint a regent or to exercise their normal legislative functions, the constitutional prerogatives of the King were operated, according to s. 79 of the Belgian Constitution: "in the name of the Belgian people, by the Ministers assembled in Council, and under their responsibility."³

Accordingly, all royal decrees, being the decisions of the executive power under the King's signature, now take the form of "orders by the Ministers assembled in Council" (*arrêts des Ministres réunis en Conseil*), whilst all laws, being the statutes approved by the Houses of Parliament and enacted with the King's assent, take the form of "decree-laws" (*arrêts-lois*) under the signatures of the ministers assembled in Council.⁴

This is the constitutional basis on which legislation is passed by the Belgian Government in exile.

Diversity of Legislative Activity.—When one looks at the activity of this Government since it left the national territory at the end of May, 1940, one is amazed at the diversity of the objects which required its legislative or executive attention. It is impossible, within the scope of this article, even to give the complete list of all the decree-laws and orders edicted. Moreover, many of them appear to be interesting only from the point of view of administration. No attempt will therefore be made to give more than a short survey of that legislative activity. But some important decree-laws interesting from the point of view of comparative legislation will be more extensively dealt with.

Governmental Machinery.—The Government needed its machinery to be adapted to the new circumstances.

By an order⁵ of February 19, 1942 (*Moniteur*, March 4, 1942), the function of under-secretary of State was created. It had never existed before in Belgian public law. The under-secretaries of State are not ministers. The activity of each of them is controlled by a minister who is responsible for it. Nevertheless, they have a large freedom of decision in the field of practical administration, and they frequently attend the meetings of the Cabinet.

An order of March 30 (*Moniteur*, April 16, 1943), provides that, during wartime and in order to improve the means of information and of action of the Government, a post of Counsellor of State may be created. The Counsellor of State is appointed by order of the Ministers assembled in Council. He may be called upon to attend the meetings of the Cabinet. He reports to the Government on all questions the study of which has been entrusted to him.

³ Elections for the House of Representatives and the Senate were due to take place in 1943. Owing to the state of war and the occupation of the national territory by the enemy, a decree-law of March 18, 1943 (*Moniteur belge*, April 13, 1943), similar to two decree-laws of 1916 and 1918, adjourns the summoning of the electors and prolongs the mandate of representatives and senators until a date to be fixed by the legislative power. This decree-law will enable Parliament to meet validly as soon as the national territory is liberated and to take cognizance of a report on the Belgian Government's activity in exile. (See the Belgian Prime Minister's speech of July 21, 1943, in *La Belgique indépendante*, London, July 29, 1943.)

⁴ During the last war, "decree-laws" were edicted by the King and Government. As is the case now, the summoning of Parliament was then equally impossible. After the war was over, our Supreme Court of Justice (*Cour de Cassation*) decided firmly that whereas two branches of the legislative power were unable to function (in casu "Chambre" and "Sénat") the remaining third branch, the King, was able, nay, was bound by constitutional duty to uphold and operate Belgian legislative power. (Decisions of the "Cour de Cassation" of February 18 and April 27, 1920, recorded in the *Pasicrisie Belge*, 1920, vol. I, pp. 62 and 124. These decisions referred to s. 26 of the Constitution: "The legislative power is operated collectively by the King, the House of Representatives and the Senate.") On the legal position of the Belgian Government in exile see also: Henri Rolin, "La Constitution belge et le Gouvernement," in *Belgium* (review), New York, May 10, 1941, pp. 6-8, and C. Tschoffen, "The exceptional powers exercised by the Belgian Government," in *Message*, Belgian Review, London, July, 1942, pp. 23-27.

⁵ "Orders by the Ministers assembled in Council" will be shortly referred to as "orders."

Another innovation consists in the creation of a High Commissioner for the Security of the Realm (decree-law of July 29, 1943, *Moniteur*, August 4, 1943). His duty is to co-ordinate all measures tending to the maintenance of order in freed territory.

A "Conseil Juridique," i.e., a Committee of Jurists, whose advice the Government may ask for the drafting of decree-laws and orders, was also established by order of January 25, 1941 (*Moniteur*, February 5, 1941).

Further, by an order of February 11, 1942 (*Moniteur*, March 4, 1942), a "Conseil consultatif du Gouvernement" was set up. This order has been replaced by the order of May 20, 1943 (*Moniteur*, June 1, 1943), as modified by the order of July 28, 1943 (*Moniteur*, August 4, 1943). The "Conseil consultatif du Gouvernement" is a political advisory committee of Ministers of State,⁶ members of the Houses of Parliament residing in the United Kingdom, and of persons appointed by the Government. At the request of the Government, or on its own initiative, this "Conseil" gives advice on questions of general interest relating to the Government's policy. The Government is bound to consult the "Conseil" before deciding on budgets or enacting legislation affecting the interests of Belgian subjects at large, with the only exception of military and naval matters.

A special Commission was, as early as the beginning of 1941, entrusted by the Government with the study of the post-war problems. Its status has been confirmed by the decree-law of June 4, 1942 (*Moniteur*, June 30, 1942).

By order of December 31, 1942 (*Moniteur*, February 26, 1943), a High Commissioner for food relief and supply has been created, under the Minister of Economic Affairs. To the preparatory work already accomplished in this field by the above Belgian Commission for the study of post-war problems in conjunction with the Leith-Ross Committee, this High Commissioner will take all executive measures in order to provide the country with the necessary food and raw materials as soon as it will be liberated.⁷

For national propaganda, two corporate bodies were constituted in the United Kingdom: the "Office Belge d'Information et de Documentation" (Belgian News Agency) (decree-law of December 5, 1940—*Moniteur*, January 16, 1941, as modified by the decree-law of October 30, 1942—*Moniteur*, November 3, 1942), and the "Office de Radiodiffusion Nationale Belge" (Belgian National Broadcasting) (decree-law of October 13, 1942—*Moniteur*, November 13, 1942).

A great number of enactments deal with the organization of the Belgian civil service in Great Britain. A brief reference may be made here to some of them.

The decree-laws of January 10, 1941 (*Moniteur*, February 3, 1941), April 17, 1941 (*Moniteur*, May 13, 1941), August 21, 1941 (*Moniteur*, September 15, 1941), November 27, 1941 (*Moniteur*, January 15, 1942), March 12, 1942 (*Moniteur*, May 20, 1942), relate to the salaries and indemnities of civil servants. The order of May 29, 1941 (*Moniteur*, July 5, 1941), creates an office for the supervision of the recruitment of civil servants. The order of May 13, 1942 (*Moniteur*, June 15, 1942), regulates the discipline of the civil service and establishes a "Chambre de recours interdépartementale" to which every civil servant may appeal in case he is dissatisfied with any disciplinary action which the Administration proposes to take against him.

With a view to securing the maximum Belgian war effort, the decree-law of April 30, 1942 (*Moniteur*, May 20, 1942), as modified by the decree-law of October 8, 1942 (*Moniteur*, October 26, 1942), makes it compulsory for all

⁶ In Belgium, the quality of Minister of State is conferred by the Crown. It confers a dignity and gives a rank in the protocole. But it constitutes no office. The title is permanent and it is distinct from that of Cabinet Minister. A Minister of State may be at the same time Cabinet Minister. If he is not, his being a Minister of State does not entitle him to become a member of the Cabinet. Ministers of State are sometimes called upon individually to act as counsellors to the Crown.

⁷ The Leith-Ross Committee was set up by the Inter-Allied Resolution of September 24, 1941, signed by the Belgian Government.

members of the staff of public corporations and for all civil servants to assume in Great Britain, in Congo or in Ruanda-Urundi any public or private functions which the competent authority directs them to assume.

Public Finance.—The matter of public finance may be divided into four main topics: ways and means, budgets, central bank and book-keeping. Amongst others, the following measures are of interest.

The loans of the Belgian Government are guaranteed by the Belgian Congo, according to the decree-laws of September 26, 1941 (*Moniteur*, October 28, 1941), December 6, 1941 (*Moniteur*, January 15, 1942), February 10, 1942 (*Moniteur*, March 25, 1942), September 24, 1942 (*Moniteur*, September 29, 1942), and April 6, 1943 (*Moniteur*, May 1, 1943). Actually the Belgian Government in London has borrowed only from Belgian financial institutions.

The Minister of Finance is authorized to issue Treasury Certificates of six months date (decree-law of February 5, 1942—*Moniteur*, May 20, 1942).

The decree-law of December 17, 1942 (*Moniteur*, December 31, 1942) suspends, for the duration of the war, any time-limits as regards income-tax.

Budgets, as well as accounts, of ways and means and of expenditure are regularly published in the official gazette *Moniteur Belge* (cf. the issues of July 25, 1941, October 28, 1941, December 15, 1941, January 20, 1942, March 13, 1942, March 25, 1942, April 22, 1942, July 15, 1942, October 12, 1942, November 12, 1942, January 26, 1943, February 19, 1943, February 26, 1943, March 5, 1943, June 1, 1943, and June 28, 1943).⁸

The decree-law of November 27, 1941 (*Moniteur*, December 10, 1941), relates to the organization of the Belgian Central Bank (*Banque Nationale de Belgique*) in free territory, and on order of the same date (*ibidem*) appoints a governor to it.

Special provisions adapt governmental book-keeping to the exceptional circumstances: decree-laws of June 24, 1940 (*Moniteur*, June 19-25, 1940), December 19, 1940 (*Moniteur*, March 19, 1941), July 31, 1941 (*Moniteur*, September 15, 1941), and February 5, 1942 (*Moniteur*, June 15, 1942), and orders of February 5, 1942 (*Moniteur*, March 25, 1942), and December 10, 1942 (*Moniteur*, February 26, 1943). These provisions generally exempt all public expenditure and the issue of public loans from the visa of the "Cour des Comptes" (this is a body akin to the Audit Department of Treasury). Inside the Belgian Ministry of Finance, a special "Bureau" has been set up, which temporarily exercises most of the functions of the "Cour des Comptes." It is further provided that, when war is over, the "Cour des Comptes" will be entitled to examine "a posteriori" all the financial measures of the Belgian Government in exile.

Armed Forces.—The constitution of Belgian armed forces in Great Britain required the enactment of appropriate legislation.

When Belgium was attacked by Germany on May 10, 1940, the Belgian Army in the field numbered over 600,000 men. After the Allied forces were surrounded in Flanders and after the capitulation of May 28, 1940, the Belgian Government still disposed of nearly 100,000 reserve troops in France. They could have been brought to the front line in due course, if France herself had not collapsed at the end of June, 1940. The organization of Belgian Forces in the United Kingdom began as early as the autumn of 1940.

All Belgians between 16 and 45 years of age, residing either in countries where a Belgian diplomatic representative is accredited or in any French territory outside Europe except Indo-China, are liable for military service; seamen, fishermen, and colonial personnel are exempted in principle (decree-law of December 22, 1942—*Moniteur*, January 12, 1943—co-ordinating five former decree-laws on this matter, the first of which was dated January 30, 1941).

A decree-law of May 29, 1941 (*Moniteur*, June 25, 1941), authorizes the voluntary enlistment of foreign subjects in the Belgian Army.

⁸ Cf. s. iii of the Constitution: "Taxes for the benefit of the State are voted annually. The laws which establish them are valid for one year only unless renewed."

During the Government's stay in France some important enactments were passed. The decree-law of June 8, 1940 (*Moniteur*, June 9-11, 1940), regulates the organization and the competence of military jurisdictions in France. This decree-law had, of course, only temporary validity. More important is another decree-law of the same date (*ibidem*), which is still valid. It provides that no decision whatever of a Belgian Court-Martial during "war-time"⁹ can be appealed against before the Supreme Court (Court de Cassation). The obvious reason for this measure is that there is no Belgian Supreme Court outside occupied Belgium.

The orders of October 31, 1940 (*Moniteur*, November 22, 1940) and January 10, 1941 (*Moniteur*, January 31, 1941), and the decree-laws of November 19, 1940 (*Moniteur*, November 29, 1940), May 8, 1941 (*Moniteur*, May 27, 1941), and April 22, 1943 (*Moniteur*, May 8, 1943), relate to the organization of Belgian Courts-Martial in the United Kingdom.¹⁰ The decree-law of July 17, 1941 (*Moniteur*, August 8, 1941) gives them an unlimited territorial competence as regards the repression of desertion during wartime, and authorizes them in such cases to pass sentences by default; civilians may also be tried as deserters before a Court-Martial according to this decree-law.

There are numerous other enactments concerning the armed forces which it is impossible to record here. Only a few more will be mentioned; the decree-law of July 20, 1941 (*Moniteur*, January 15, 1942), as modified by the decree-law of May 20, 1942 (*Moniteur*, June 30, 1942), creating the "Croix de Guerre, 1940" (Belgian War Cross, 1940)¹¹ for bravery in the field, in the air, at sea, or in the colonies; the decree-law of July 17, 1941 (*Moniteur*, August 8, 1941), as modified by the decree-law of August 4, 1943 (*Moniteur*, August 21, 1943), relating to family allowances, and the decree-laws of March 19, 1942 (*Moniteur*, April 22, 1942, and June 4, 1942 (*Moniteur*, June 30, 1942), relating to military pensions.¹²

The order of January 30, 1941 (*Moniteur*, February 17, 1941), as modified by the orders of August 21, 1941 (*Moniteur*, September 15, 1941), and December 3, 1942 (*Moniteur*, December 31, 1942), regulates the organization of the Belgian Red Cross in Great Britain.

Foreign Relations.—Foreign relations provide a wide field of activity for the Belgian Government in London.

Belgium is one of the United Nations.¹³ The Belgian Government signed the Declaration of Washington, January 1, 1942, which endorses the principles embodied in the joint declaration made on August 14, 1941, by Prime Minister Winston Churchill and President Franklin D. Roosevelt, known as the Atlantic Charter, and contains the pledge of full co-operation for the prosecution of the war and the promise not to make a separate armistice or peace with the enemy. The Belgian Government had previously signed the Inter-Allied Resolutions of June 12, 1941, and September 24, 1941, which contain similar provisions.

With regard to the looting of our country by the Germans, and as a complement to the provisions of the decree-laws of January 10, 1941 (of which more will be said further on¹⁴), the Belgian diplomatic representatives conveyed to

⁹ According to art. 58 of the law of June 15, 1899, for the purposes of the enforcement of penal laws and of the judicial organization, "wartime" legally begins on the day fixed by royal decree for the mobilization of the Army and ends on the day fixed by royal decree for bringing the Army back on its peace-footing.

¹⁰ In accordance with the provisions of the British "Allied Forces Act, 1940."

¹¹ The Belgian War Cross, 1940, is awarded by order of the Ministers assembled in Council. The Government exercises in this matter the royal prerogative of s. 76 of the Constitution.

¹² Cf. s. 119 of the Constitution: "The contingent of the Army is voted annually. The law which determines its size is valid for one year only unless renewed." See accordingly, *Moniteurs* of March 19, 1941, February 16, 1942, and February 26, 1943.

¹³ The state of war exists—for instance—between Belgium and Japan since the end of 1941 (see *Moniteur*, January 15, 1942). This official announcement refers to the Nine Power Treaty of Washington, February 6, 1922, to which Belgium is a party.

¹⁴ Cf. below, p. 39.

the Governments to which they are accredited a declaration on behalf of the Belgian Government, dated May 21, 1942, warning Allied and neutral subjects that the measures taken by the occupying power may be declared null and void, eventually with retrospective effect, by appropriate legislation as soon as the national territory will be freed. On January 4, 1943, the Belgian Government signed with the other United Nations a Joint Declaration drafted on much the same lines as the Belgian Declaration of May 21, 1942, but adding to it the important factor of the United Nations' solidarity in this respect.

The Belgian Government also signed the Inter-Allied Declaration of January 13, 1942, on the punishment for war crimes.

Since the occupation of Malaya and of the Netherlands East Indies by the Japanese, the Belgian Congo has become one of the most valuable strategic and economic assets of the United Nations. However, its importance had long before been recognized by the United Kingdom. As early as January 21, 1941, two agreements were signed between the Belgian and British Governments relating to the Belgian Congo in respect of finance and the purchase of commodities (*Moniteur*, July 19, 1941). On June 4, 1942, a new agreement was signed in respect of the purchase of commodities only, the agreement of January 21, 1941, in respect of finance remaining in force. Practically all the large Congo supplies of copper, cotton, copal, palm kernels and palm oil, tin ore, rubber, wolfram, jute substitutes and coffee are purchased by the United Kingdom (*Moniteur*, August 25, 1942).

Belgium lends her financial assistance to her close friend the Grand Duchy of Luxemburg, with which she constitutes, since the treaty of July 23, 1921, the Belgo-Luxemburg Economic Union. This assistance is provided by the agreement of June 17, 1941 (approved by the decree-law of July 17, 1941—*Moniteur*, August 8, 1941), and the additional agreement dated May 30, 1942 (approved by decree-law of November 5, 1942 (*Moniteur*, December 3, 1942)).

In accordance with the Lease-Lend Act of March 11, 1941, and the Anglo-American Mutual Aid Agreement of February 23, 1942, an agreement was signed on June 16, 1942, between the Belgian Government and the United States of America "on the principles applying to mutual aid in the prosecution of the war against aggression" (*Moniteur*, September 25, 1942).

Two more international documents signed by the Belgian Government should be mentioned here: the protocol of July 22, 1942, to enforce and to prolong after August 31, 1942, the international agreement regarding the regulations of production and marketing of sugar signed in London, May 6, 1937 (*Moniteur*, October 26, 1942), and the agreement of September 9, 1942, for the international control of the production and export of tin (*Moniteur*, November 24, 1942).¹⁵

The Belgian Congo and Ruanda-Urundi.—The importance of the Belgian Congo has already been stressed.¹⁶

On the eve of the French breakdown, the Belgian Government feared lest they should be trapped in France. With regard to the vital need of retaining under the Belgian legitimate authority, by all means available, the Government of the Congo-Colony and of the mandated territories Ruanda-Urundi, the Belgian Government passed, on June 18, 1940, a decree-law which made the Minister of the Colonies "Administrateur-Général" of the Colonies and entrusted him—and in default of him the Governor-General—with all the powers of the King under the Belgian Colonial Acts of Oct. 18, 1908, and Aug. 21, 1925, as well as with all the legislative and executive powers of the Ministers assembled in Council (*Moniteur*, June 13-18, 1940). The Minister of the Colonies proceeded forthwith to leave France.

After the Belgian Government had moved to Great Britain, the exceptional

¹⁵ See below p. 9 for the ratification of the international convention on forced or compulsory labour.

¹⁶ See above p. 7, on the agreements concerning the purchase by Great Britain of all supplies in the Belgian Congo. See also p. 4 on the Belgian Congo's guarantee for the loans of the Belgian Government.

measures provided by the decree-law of June 18, 1940, were no longer necessary. They were abrogated and replaced by a decree-law of April 29, 1942 (*Moniteur*, May 30, 1942). According to the new provisions, the Minister of the Colonies exercises all the powers of the King under the Colonial Acts and the law of Sept. 7, 1939. Under these acts, the Minister of the Colonies exercises the colonial legislative power by way of "décrets" and the colonial executive power by way of "arrêtés," whilst the Ministers assembled in Council retain their metropolitan legislative and executive powers. All the enactments passed by the Minister of the Colonies or the Governor-General by virtue of the decree-law of June 18, 1940, were confirmed by the decree-law of April 29, 1942.

Art. 15 of the Belgian Colonial Act of 1908, as modified by the law of March 5, 1912, has been abrogated and replaced by the decree-law of May 19, 1942 (*Moniteur*, July 25, 1942), which establishes a new régime of concessions of mines and of cessons and concessions of Government estates in Congo.

The administration of colonial justice has been adapted to war circumstances by the decree-laws of January 30, 1941 (*Moniteur*, February 5, 1941), April 3, 1941 (*Moniteur*, April 24, 1941), and September 24, 1942 (*Moniteur*, September 29, 1942).

For the duration of the present legal wartime, a decree-law of April 29, 1943 (*Moniteur*, June 1, 1943), establishes a postal censorship in the Belgian Congo and in Ruanda-Urundi. This censorship applies also to any transmissions between places where no postal service exists.

A decree-law of May 20, 1943 (*Moniteur*, July 15, 1943) provides that, in wartime or when difficulties arise endangering public security, the Governor-General may mobilize within the whole or part of the colonial territory. Under the mobilization order, the Governor-General may requisition any persons (natives or others) and any goods or enterprises for service in the public interest.

The international convention of 1930 on forced or compulsory labour has been ratified by the decree-law of May 20, 1943 (*Moniteur*, July 31, 1943), with only a few alterations, the most interesting of which is that in the Belgian colony certain kinds of cultivation may be made compulsory with a view to the agricultural education of the natives.¹⁷

Maritime Questions.—The marshalling of the Belgian resources in merchant shipping and naval personnel has given rise to another series of legislative measures.

For the requisitioning of merchant ships in wartime, Art. 34 of the law of May 12, 1927, on military requisitions provided the necessary basis. Accordingly, all Belgian merchantmen have been requisitioned since May 10, 1940.

¹⁷ This survey of colonial enactments does not exhaust the subject. For instance, nothing is said about the "ordonnances" of the Governor-General. By virtue of the Colonial Act, 1908, the Governor-General is made the representative of the King in the Colony. In this capacity, he exercises the colonial executive power by way of "ordonnances." Under the same Act he may, in an emergency, exercise the colonial legislative power by way of "ordonnances législatives." These legislative ordinances are valid for six months only unless they are approved by a "décret" (art. 22, par. 4 of the Colonial Act, 1908). This provision has been modified by the decree-law of April 29, 1942: the legislative ordinances remain in force as long as they have not been abrogated by the Governor-General himself, by a "décret" or by a decree-law. These ordinances are not "legislation in exile," since the Belgian banner flies freely over our African Empire. The *Anglo-Belgian Trade Journal*, edited monthly in London, contains valuable information on Belgian colonial legislation. Cf. *inter-alia*, Prof. Heyse's "L'Article 15 de la Charte du Congo Belge" (November, 1942) and "Législation Minière au Congo Belge, 1938-1942. (January, 1943, February, 1943, April, 1943, and May, 1943). By way of legislative ordinances the Governor-General may thus temporarily alter the "décrets," being the colonial legislation passed by the King acting upon the advice of the "Conseil colonial" and with the counter-signature of the Minister of the Colonies. But he may never alter a law passed by the metropolitan legislative power. Metropolitan legislation in exile takes the form of decree-laws (cf. *supra*, p. 31). Colonial legislation (e.g., "décrets") is passed by the Minister of the Colonies according to art. 3 of the decree-law of April, 29, 1942.

The transfer of the Belgian merchant fleet under State control necessitated the creation of a public body, the so-called "Régie de la Marine," distinct from the normal administration of the Ministry of Communications. It has been exempted from the regulations relating to State book-keeping, so as to make it possible for the "Régie" to be run on commercial lines (decree-law of August 29, 1941—*Moniteur*, September 15, 1941).

A decree-law of January 10, 1941 (*Moniteur*, February 3, 1941) fixes temporarily in Great Britain the "port d'attache" of the ships sailing under the Belgian flag.

The order of June 10, 1940 (*Moniteur*, June 9–11, 1940), and the decree-law of July 1, 1942 (*Moniteur*, July 25, 1942), as modified by the decree-law of October 8, 1942 (*Moniteur*, October 26, 1942), provide for the requisitioning of all seamen and fishermen.

The provisions of the law of June 5, 1928, regulating the contracts for services in the mercantile marine have been modified, as regards the indemnities to be paid to naval personnel in case their ship is lost at sea, first by the decree-law of May 23, 1941 (*Moniteur*, August 11, 1941), and afterwards by the decree-law of April 8, 1943 (*Moniteur*, May 20, 1943). The latter provides that those indemnities shall be fixed by collective agreements between the unions of seamen and the shipowners' association approved by the Minister of Communications on the advice of the "Mixed Commission for the Merchant Navy" (cf. *infra*).

The decree-law of December 17, 1942 (*Moniteur*, January 26, 1943), determines the equivalence of certain British commissions of officers in the merchant navy with the corresponding Belgian commissions.

A "Commission professionnelle mixte de la Marine Marchande" has been set up to advise the Minister of Communications on all questions relating to the respective interests of shipowners, officers and sailors (order of January 10, 1941—*Moniteur*, January 31, 1941). The five members of this "Mixed Commission for the Merchant Navy" are appointed by the Minister of Communications, two of them being chosen on a list presented by the shipowners' association, one on a list presented by the unions of officers, a fourth on a list presented by the sailors' unions, the fifth being chairman of the Commission.

The wages of the naval personnel have been fixed by the orders of May 23, 1941 (*Moniteur*, August 11, 1941), July 3, 1941 (*ibidem*), and April 4, 1943 (*Moniteur*, May 20, 1943), whilst the decree-laws of May 23, 1941 (*Moniteur*, August 11, 1941), November 12, 1942 (*Moniteur*, December 3, 1942), April 1, 1943 (*Moniteur*, April 16, 1943), April 6, 1943 (*Moniteur*, May 20, 1943), and the orders of July 3, 1941 (*Moniteur*, August 11, 1941), December 18, 1941 (*Moniteur*, January 26, 1942), and April 6, 1943 (*Moniteur*, May 20, 1943), contain provisions for its social security.

In accordance with the provisions of the British "Allied Powers (Maritime Courts) Act, 1941," the decree-law of October 23, 1941 (*Moniteur*, November 14, 1941) establishes Belgian Maritime Courts in the United Kingdom for a period which shall not exceed the duration of the legal wartime. They have full penal and disciplinary jurisdiction, even for crimes, in matters relating to the mercantile marine. However, no civil action can be brought before them arising out of an offence under their jurisdiction. The Belgian Maritime Courts are itinerant. There are two of them: the Maritime Tribunal (lower Court), composed of one judge, and the Maritime Court of Appeal (higher Court), composed of three judges. No decision of the Maritime Courts can be appealed against before the "Cour de Cassation."

Three other decree-laws, dated all July 1, 1942 (*Moniteur*, July 25, 1942), concern legal matters connected with the existence of the Belgian Maritime Courts in the United Kingdom.

Refugees.—The Belgian refugees in Great Britain, though far less numerous than they were in France in 1940, needed to be taken care of in various ways.

Pursuant to an agreement with the British Government concerning

participation in the war effort by Belgian subjects residing in the United Kingdom, a Commission was set up to advise the Belgian Ministry of Labour on all questions arising out of registration to that effect (order of September 26, 1941—*Moniteur*, October 28, 1941).

For loans to Belgian refugees, as well as for the deposit of their savings, a "Caisse Belge de Prêts et d'Epargne" was established by decree-law of May 28, 1942 (*Moniteur*, July 25, 1942), abrogating three prior decree-laws. This institution has converted the greater part of its deposits into British "War Savings Bonds."

An order and a decree-law, both of July 3, 1941 (*Moniteur*, August 8, 1941), as modified by the decree-law of May 13, 1943 (*Moniteur*, June 1, 1943), further provide for allowances to be paid to Belgian refugees.

In the matter of education, some interesting measures have also been taken. The decree-law of February 26, 1942 (*Moniteur*, April 22, 1942), determines the equivalence of British and other foreign diplomas with the corresponding Belgian diplomas. However, as regards the degree of "Doctor of law," a special jury has been instituted by which students shall be examined for that degree (decree-law of October 8, 1942—*Moniteur*, December 31, 1942). The order of January 25, 1941 (*Moniteur*, February 17, 1941), as modified by the order of November 19, 1942 (*Moniteur*, December 3, 1942), sets up an advisory Committee on questions relating to the education of Belgian subjects in Great Britain.

Enactments Affecting Private Rights.—A series of important enactments are related to private rights.¹⁸ Most of them can be grouped under the heading "trading with the enemy."

A decree-law of April 10, 1941 (*Moniteur*, April 24, 1941), prohibits any kind of economic intercourse between Belgian subjects and enemy subjects or persons residing in enemy territory or in territory occupied by the enemy. By order of the Ministers assembled in Council, territories deemed to be controlled by the enemy may be assimilated to enemy-occupied territories. This interdiction applies only to Belgian subjects residing in free territory, with the exception of Congo and Ruanda-Urundi, which colonies have their own legislation on this matter. The civil sanction is the nullity of the illegal transactions. Illegal transactions are also offences for which penalties may be inflicted by court-martial during the legal wartime (cf. *supra* p. 34, footnote ⁹), the ordinary tribunals being competent to deal with these particular offences after the end of that period.

Belgian assets situated outside enemy-occupied territory, whether they are owned by individuals residing in occupied territory or whose residence is not known, or owned by companies having their head office in occupied territory had to be protected against appropriation for the benefit of the enemy. The *Moniteur Belge* of March 31, 1942, contains a decree-law of March 19, 1942, relating to individual property, and a decree-law of February 19, 1942 (abrogating and replacing the decree-laws of February 2, 1940, June 8, 1940, and October 31, 1940, and the legislative ordinances of the Governor-General of the Belgian Congo of September 3, 1940, and November 13, 1940), relating to company property.¹⁹ Both decree-laws are to the following effect: When there are in free territory persons who are the legal representatives of the individual or corporate owners of assets situated outside enemy-occupied territory, these representatives have to report to the competent Belgian authorities. Their powers may be validated—and even extended by the Minister of Economic Affairs or by the Minister of the Colonies. If the legal representatives do not report within a certain delay, their powers may be declared void. In any case, to be able to exercise their powers, they need a certificate from the competent Minister, which

¹⁸ See also p. 13, under "Abrogation of the measures taken by the occupying power."

¹⁹ The decree-law of March 19, 1942, does not apply to individual property situated in Congo or Ruanda-Urundi (which have their own legislation on this matter), whilst the provisions of the decree-law of February 19, 1942, extend to corporate property situated in the Colonies.

can be refused, or revoked. When there is no representative of the owners of such assets as described above, the competent Minister may appoint one or more representatives and determine their powers.²⁰

During the Belgian Government's stay in France, a decree-law had been made on June 3, 1940 (*Moniteur*, June 12, 1940), setting up an "Office d'Identification et de Liquidation des Marchandises belges en France." The task of this "Office" was to identify and preserve property-rights in Belgian goods in France, the owners of which were absent as a consequence of the war. The "Office" had wide powers to that effect. This decree-law was abrogated and replaced by the decree-law of February 27, 1941 (*Moniteur*, May 6, 1941), which established a corporate body called "Office de Gestion et de Liquidation" (Belgian Trading Committee) in London. Its object is different from that of the "Office" in France. The new trading committee administers, and eventually liquidates the goods which have been transferred to it by the Minister of Economic Affairs. According to the provisions of the decree-law of February 27, 1941, it chiefly concerned Belgian goods requisitioned by a foreign State and then handed over to the Belgian State. By a decree-law of April 6, 1943 (*Moniteur*, May 1, 1943), the Belgian Trading Committee is made competent to deal with all kinds of goods or rights transferred to it by the Belgian Minister of Economic Affairs or directly by a foreign State, authority or body with the assent of that Minister.

Under Art. 7 of the decree-law of March 19, 1942, the Belgian Trading Committee may be appointed by the Minister of Economic Affairs to act as the representative of an absent individual owner of Belgian assets in free territory. By the decree-law of April 6, 1943, it may also be appointed in such capacity as regards corporate assets.

The owners of property transferred to the Belgian Trading Committee are entitled to delivery in kind or to the product of liquidation, under deduction of costs. To this the decree-law of April 6, 1943, adds that all dealings by the Committee acting within the limits of its capacity are binding on the owners, who will also be able to avail themselves of their results.

A common feature of the decree-laws of February 27, 1941, February 19, 1942, and March 19, 1942, is that all three kinds of representatives appointed by the competent Minister: Belgian Trading Committee, "Commissaire-Gérant" (for company assets) or "Mandataire-Gérant" (for individual assets) are exclusively responsible to the State. The owner can only sue them for gross neglect or fraud, or if they have acted *ultra vires*.

A decree-law of April 17, 1941 (*Moniteur*, May 13, 1941), as modified by the decree-law of January 8, 1942 (*Moniteur*, January 26, 1942), makes it possible for the debtors of insurance²¹ premiums to pay them validly to the legal representatives of the insurers residing outside free territory, or if there are no such representatives, to the Belgian Trading Committee. On the other hand, this Committee is entitled by the decree-law of January 8, 1942 (*Moniteur*, February 16, 1942), to accept for the account of absentees or persons with whom dealings are impossible owing to the war, all insurance indemnities due by insurers residing outside occupied territory as a consequence of events prior to May 10, 1940.

Abrogation of the Measures Taken by the Occupying Power.—The various activities of the enemy in occupied territory also called forth a reply by the legitimate authorities of Belgium.

A decree-law of January 10, 1941 (*Moniteur*, February 25, 1942), similar to a decree-law made during the last war on April 8, 1917, provides that all measures

²⁰ Apart from the administration of company-assets, the decree-law of February 19, 1942, contains extensive provisions concerning a new system of company-registration, the transfer of the head office of Belgian companies to free territory, etc. (cf. Alex Salkin, "Belgian Companies in Wartime," in *Belgium* (review), New York, April, 16, 1942, and May, 1942).

²¹ "Assurance terrestre" as distinct from marine-insurance.

taken by the occupying power will be considered as abrogated without any further formality *pari passu* with the liberation of the territory. All laws, rules and orders made by the legitimate authority are binding for the whole of the Belgian territory, unless they provide for the contrary. They will be enforced by the administrative and judicial authorities as the liberation of the territory proceeds.

Another decree-law of the same date (*ibidem*), similar to a decree-law of May 31, 1917, declares null and void all measures of dispossession, affecting private or public property, taken by the enemy.²² The property may be claimed against any possessor, without the owner having to pay any indemnity. The possessor can sue the person from whom he holds the goods. Claims are barred three years after the conclusion of the peace. It is forbidden, on penalty, to assist in the execution of measures of dispossession.

Penal Law.—Articles 113, 117, 118 *bis* and 121 *bis* of the Penal Code, dealing chiefly with high treason, have been modified and interpreted by the decree-law of December 17, 1942 (*Moniteur*, December 29, 1942).

According to article 113, any Belgian who takes up arms against Belgium shall be sentenced to death. This article has been completed by the new decree-law which provides that any kind of assistance to the armies of the enemy in the field (e.g., to drive an army-lorry) shall be assimilated to the former offence.

Article 117 assimilates the Allies of Belgium to Belgium herself for the application of provisions like those of article 113. The new decree-law interprets the term "Allies": it means not only the States with which Belgium has entered into a treaty of alliance, but all States at war with a State with which Belgium is at war.

Article 118 *bis* provides penalties for assistance given to the enemy tending to the transformation of our public institutions as well as for any action by which loyalty to the King and the State has been shaken. Propaganda to such ends as well as propaganda with a view to undermining the spirit of resistance to the enemy is made an offence and the various crimes under article 118 *bis* may now be punished by death.

According to the new provisions, article 121 *bis* punishes more severely denunciation which exposes any person to any kind of hardship on the part of the enemy. The former text was generally more lenient. Moreover, it provided for punishment in particularly grave cases only when the person denounced himself had become the victim of such hardship.

A decree-law of April 29, 1943 (*Moniteur*, May 8, 1943) suspends any time-limits as regards offences the prosecution of which was prevented during the occupation either because their perpetration benefited the enemy or because the offenders were under the protection of the enemy.

This survey of Belgian legislation in exile ends on August 31, 1943. The first enactment made abroad was dated May 28, 1940.

LEGISLATION IN EXILE: LUXEMBOURG¹

[Contributed by DR. ERNST J. COHN.]

THE legislation enacted by the Government of the Grand Duchy of Luxembourg during their period of exile in the present war is remarkable for one feature, which distinguishes it from the legislations of our other Allies: it is by far the least bulky one among them. That is, of course, partly due to the fact that only comparatively few Luxembourg citizens are living in Allied territory and that for this

²² This decree-law is very important as regards private rights. In this respect it may even affect nationals of foreign countries (cf. also p. 7).

¹ On the legislation of other Allied Powers in exile see Lachs, "Polish Legislation in Exile," 24 *Jour. Comp. Leg.* (1942), pp. 57 ff., Schwelb, "Legislation in Exile: Czechoslovakia," *ibid.* 120 ff., Official of the Royal Norwegian Ministry of Justice and Police: "Legislation in Exile: Norway," *ibid.* pp. 125 ff., Drucker, "The Legislation of the Allied Powers in the United Kingdom, Czechoslovak Yearbook of International Law (1942)," pp. 45 ff., and the further literature quoted by Schwelb, *l.c.*, p. 120, note 1.

reason some of the problems for which the other Allied Governments had to provide did not arise. But this is not the full explanation. The apparent scantiness of Luxembourg legislation in exile is in the first instance due to the fact that the Luxembourg Government faced the problems of emergency before they arose and provided for them in a manner which left little to be done when what had been anticipated actually happened. It was obvious that Luxembourg would not be able to resist an invasion by German troops. The Luxembourg Government in the pre-war period not only envisaged that possibility, but prepared to the full those measures which were needed to guarantee the continued existence of a lawful Government during the period of exile and to prevent the invaders from getting a hold on the foreign assets of the State and its citizens. The legislation of the Grand Duchy is therefore an example of a country which was fully prepared for the worst that could happen to it.

The Grand Duchy of Luxembourg is a constitutional monarchy.² Its Parliament consists of one House only, but a Conseil d'Etat of 15 members, seven of whom must be doctors of law, has to be consulted on every bill which is to be laid before the Chambre des Députés. The constitution contains a clause which is unique among modern constitutions. Every legislative act must be voted twice by the House. Between the first and the second vote there must be an interval of three months. But the House may by resolution dispense with this second vote in any individual case with the consent of the Conseil d'Etat. During the First World War the Government had been given power to enact economic emergency legislation. Some of the laws³ enacted on the basis of these emergency powers both during and even after the First World War remain in force until to-day. The legality of the procedure adopted was questioned in 1937, but upheld by the Supreme Court of the Grand Duchy. It follows therefore that the House can delegate its legislative authority to the Government and in the absence of any provision to the contrary this may be done without a second vote, if the Conseil d'Etat agrees. These considerations proved to be of great importance in the present emergency. It may be added that under article 109 of the Constitution the seat of the Government may for important reasons be temporarily transferred anywhere.

The first precautions were taken very early—in fact at a time when most of the larger Western powers were still dreaming of “peace for our time.” Already, on September 27, 1938—i.e., during the Munich crisis—the second vote clause of the Constitution was again suspended. By a law of the following day the Government was given very wide powers. These enabled the Government to issue statutory rules as far as these were needed to preserve the economic order, the security of the State and that of its individual citizen. The Government was entitled to issue orders in execution of this law, to impose fines up to 20,000 fr. or to convict to imprisonment for no more than three years and to impose both fine and imprisonment up to these limits together. They were also given power to order the confiscation of any property. An account of all measures taken under this law was to be given to the Chambre des Députés at its next regular meeting.

The Munich crisis passed by, but the Luxembourg authorities were not deceived by the lull. The law of September 28, 1938, remained in force. The powers granted to the Government under that law had, however, been granted for a limited period only. They were to expire on the 31st of December, 1939. Already in the Summer 1939 it became clear that the European crisis would not be over by then. Furthermore, events in Czechoslovakia had given an object lesson in sham legality and in the unfortunate consequences which resulted from

² The Constitution of the Grand Duchy is dated October 17, 1868. It was amended on May 15, 1919. A reprint with short explanations in *Kieffer, Luxemburger Bürgerkunde* (1933), pp. 154 ff., see also *Neyens*, article “Luxemburg” in 1 *Rechtsvergleichendes Handwörterbuch* (1929), pp. 128 ff.

³ All the laws and decrees quoted in this essay are published in the *Memorial*, the official gazette of Luxembourg, copies of which may be obtained from the Consuls of the Grand Duchy.

it. To avoid a similar fate for the Grand Duchy, a new resolution of both Houses of Parliament of August 29, 1939, again suspended the second-vote-clause of the Constitution and on the strength of this resolution another law was passed on the same day which extended the time during which the Government should have the powers granted to it by the 1938 law for an indefinite period, i.e., until the passing of a new law restituting the normal functioning of the Constitution. The same law took measures to prevent the invaders from holding sham elections and form a Quisling Government with the help of the representatives thus elected. According to this law "in case of an European war and if the carrying through of elections should meet with insuperable obstacles or should prove to be extremely inconvenient, the Government is authorised to postpone the date of all elections—both of political and social bodies, especially those of the legislative assemblies, of communal and of professional bodies." In case the Government should be forced to make use of these powers all mandates received under the previous elections were to be considered as continuing until the time of the new elections, which are to take place as soon as the emergency will have passed. The result of these far-sighted precautions is that the setting up of a pseudo-legal Quisling régime in Luxembourg proved impossible, while the legality of the acts of the Government in exile appears to be beyond question.

Luxembourg was not drawn into the war during its first few months. That period offered a further useful demonstration of German methods of economic and financial penetration. It was felt that it was not enough to guarantee the continuation of the lawful existence of the Government and other political bodies during an eventual period of exile, but that arrangements should be made to prevent the foreign assets of the country and its citizens from falling into the hands of the invader. A number of Luxembourg companies and individuals owned considerable assets in the United States, partly directly, partly through the mediation of Belgian banking houses. While it could perhaps be expected that United States legislation would prevent any utilisation of these assets by the invader,⁴ it was clear that American legislation would and could not facilitate the utilisation of these assets by those lawful owners who would succeed in escaping from Luxembourg if, as would of course frequently be the case, only one or a few members of the board of a company or one or a few of the partners in a commercial partnership would reach freedom. The Luxembourg Government decided to provide for such cases in the most far-reaching way. There was some precedent for this course in Swiss legislation. Swiss law permitted companies which had registered with the Swiss Government for this purpose, to transfer their seat temporarily abroad to another country in case of a national emergency without losing their Swiss nationality as a result of such transfer. The Luxembourg decree of February 28, 1940, goes even further. It requires no registration with the Government and no vote by the general meeting or the majority of partners. A resolution by those who are entitled to administer the company or partnership, the board of directors or the managing partners is sufficient. The requirements of publicity are relaxed to an extent which shows how much the Government refused to be led away by considerations of prestige from the clear purpose of defeating any invader. If publication of the change in the Luxembourg Register of Commerce and the Memorial is impossible, publication in two newspapers published in the country where the new registered office is, suffices. In case of an emergency all the rules regarding the form and manner of convocation of the general meeting and the board of directors, including of course the rules concerning the place where the meeting is to take place, are suspended. The mandates of directors and managing partners are extended in the same way as those of the Government. Both the general meeting and the board of directors are given power to delegate their authority to third parties. Whenever the general meeting is prevented from exercising its functions on the ground of "force majeure," all its rights pass

⁴ This was, in fact, done with great promptness, see Executive Order No. 8,405, of May 10, 1940, i.e., of the same date on which Luxembourg was invaded.

ipso jure to the board of directors. Finally, article 6 of the same decree dealt with the most likely case that some of those entitled to manage a company or partnership should escape, while others, probably the majority, would remain in occupied territory. For this case it was necessary to provide an arrangement, enabling those who have reached freedom to act and preventing those who would be exposed to enemy pressure from interfering with such acts and from handing over foreign assets to the invader. Article 6 suspended, therefore, the authority of all those residents of occupied territory who are authorized to dispose about the property of any company or commercial partnership, in so far as assets are concerned, which were outside any part of Luxembourg territory before its occupation.

Luxembourg was occupied by German troops on May 10, 1940. The Grand Duchess and her consort, as well as four out of the five members of the Government, succeeded in escaping to Belgium. After the fall of Belgium the Government moved to France and from there to London, where the Grand Duchess and the Foreign Secretary arrived by aeroplane from Lisbon at the beginning of the Battle of Britain. The invaders purported to incorporate the country into the Third Reich. No attempt was made to set up a Quisling régime. The far-reaching precautions taken in pre-invasion times left comparatively little to do to save the country's foreign assets and to make them available to those who had reached non-occupied territory. Article 6 required extensions in various respects. These were effected by a Grand Ducal decree enacted at Montreal on February 5, 1941, while the Grand Duchess was temporarily in Canada. Article 6 had suspended the authority of residents of enemy territory to dispose about foreign property or foreign rights of companies and partnerships only in so far as such property or rights formed part of the assets of the company or partnership at the time of the occupation of Luxembourg. The decree extended, with effect from May 9, 1940, i.e., retrospectively, the suspension to all such foreign assets, including even those which became foreign assets after the invasion of the country. On the other hand, article 6 had not expressly stipulated that those persons who were members of the board of directors or managing partners would be able to exercise as *negotiorum gestores* all the powers of the full board, if they reached countries of refuge. It seems that the draftsmen responsible for the decree of February 28, 1940, expected that this would result automatically from the application of that decree, but the strict rules of literal interpretation of statutes which prevails in the Anglo-American legal world frustrated that intention. The Grand Ducal decree, therefore, ordered expressly that every director, manager, partner or other person whose signature in the name of the company or partnership has the same legal value as that of the directors, partners or managers, residing in occupied territory, could exercise all the powers granted by law or by the articles of association to the full body entitled to administer the company or partnership. The decree adds that the acts of these persons need not be confined to a mere *negotiorum gestio*, but that they could continue the entire commercial activity of the company or partnership. To avoid any doubts, the decree mentions expressly that all the quorums provided by the articles are suspended. If, therefore, one of the directors of a company incorporated in Luxembourg has succeeded in reaching an Allied or neutral country, he is fully entitled to dispose about any assets of the company outside occupied territory and to continue all the commercial activities of the company without any restrictions whatsoever.

The wide extension of these powers made it necessary to prevent their abuse by persons working in secret or open collaboration with the enemy. For this reason, only persons who had their permanent and effective habitation outside Luxembourg since May 1, 1940, are considered as residing outside enemy territory. The Minister of Justice can grant a dispensation from this requirement. It follows that third parties who are in any doubt about the question whether the person with whom they are dealing had his or her effective and continuous

residence outside occupied territory, are well advised if they require a dispensation from the Luxembourg Government. This dispensation will be granted in all cases where investigations show that there is no collaboration with or advantage to the enemy. Occupied countries in the sense of all these regulations are not only those countries which are in effective occupation by German troops, but all countries whose communications are controlled by Germany and her allies without regard as to whether or not there is a state of war between the individual country concerned and the Grand Duchy or not. It appears that this includes not only Vichy France before its occupation, but also Finland, the Balkan countries, the countries overrun by Japanese troops, etc.

The far-reaching precautions taken by the Luxembourg Government made it unnecessary to resort to a wholesale seizure of foreign assets, in the way provided by the Dutch decree of 1940 and by section 11 of the Norwegian decree of April 22, 1940. However, the rights of the statutory administration of the National Savings Bank had to be transferred to the Treasury of the Grand Duchy, as none of the members of its Board succeeded in escaping from occupied territory. The decree of February 5, 1941, declared the administration vested in the Treasury and invalidated all acts done by the statutory administration—which consisted entirely of civil servants—as invalid with retrospective effect. This decree made the valuable deposits of the Bank in the U.S.A. accessible to the Government. But the Government of Vichy handed those assets which had fallen into their hands over to the occupying power.⁵

By a decree of December, 1940, the members of the Consular corps had been given power to receive declarations regarding the liquidation and dissolution of commercial and holding companies. This proved to be insufficient, since by the decree of February 5, 1941, those members of the board, partners and managers who had succeeded in reaching freedom were enabled to carry on the full activities of Luxembourg companies and partnerships as far as circumstances permitted. For this reason the Consuls were authorized to receive all declarations concerning commercial and holding companies existing before May 10, 1940. By a further decree of February 12, 1943, the same power was granted to those Belgian Consular agents who, under the Convention about the economic union between Belgium and Luxembourg, are charged with the defence of Luxembourg interests in places where Luxembourg is not represented by a Consul or Vice-Consul. The formation of companies under Luxembourg law is, however, at present impossible. Neither are the Consuls permitted to deal with companies incorporated after the invasion as these must necessarily be suspect of being under enemy control.

While the Government was thus endeavouring to take charge of all legitimate interests of its subjects outside the power of the invading forces a complete disregard both of international law and of the Luxembourg Constitution reigned in Luxembourg itself. As a result of the incorporation of the country in the Reich, German law was introduced. The results were arbitrary confiscation, arrests, terror judgments, and the introduction of the German anti-Jewish legislation,⁶ which is contrary to the rule of equality before the law expressly laid down in article 11 of the Luxembourg Constitution. The Luxembourg Government decided not to wait until the end of hostilities with a clear and definite pronouncement of its attitude to these measures on the part of the occupying power. It had obviously no power to prevent the carrying through of these measures themselves. But it could tell the people of Luxembourg what it intends to do after the restoration of freedom, so as to encourage the oppressed

⁵ See on this decree *Drucker*, l.c. (above note 1), and *Barnett Hollander, Confiscation, Aggression, and Foreign-Funds-Control* (1942), p. 161 ff. The applicability of the decree was affirmed in *Anderson v. N.V. Transandine Handelsmaatschappij*, 28 NYS (2d) 547. See 24 *Jour. Comp. Leg.* (1942), p. 125.

⁶ On the methods adopted by the occupying power in this respect and the extent to which Jewish property in Luxembourg was confiscated, see "The Persecution of the Jews," Conditions in Occupied Territories, A Series of Reports issued by the Inter-Allied Information Committee in London, No. 6 (1943), pp. 10 ff.

and to discourage those who intended to profiteer from the occupation.. By a decree of April 22, 1941, the complete abrogation of all the measures taken by the occupying power was declared. This is to come into force as soon as the country is liberated and in accordance with the progress of its liberation. These measures would therefore be rescinded if the liberation is gradual in those parts of the territory which have regained freedom, even although in other parts, still in the hands of the invader, oppression might still reign. There is to be no intermediate stage. The restitution of the country's sovereignty results automatically in the return of the liberal constitution which was in force before the invasion. The occupation is not allowed to leave a permanent imprint upon the structure of the law of the country. On the other hand, all the laws, decrees, rules and orders enacted by the Government in Exile come into force in the country automatically with the progress of its liberation. The administrative and judicial authorities are charged with their due execution without any further announcement.

It is clear that this very general decree does not more than lay down a fundamental rule whose application to the complex realities will prove a most difficult task. The main problem is, of course, constituted by the very far-reaching spoliation of public and private bodies and persons which, as everywhere, has taken place in Luxembourg. Confiscations have, in Luxembourg, been nearly entirely confined to the property of those who offered active resistance and to Jewish property. There has not been the same amount of wholesale seizures as, e.g., in Poland. On the other hand, the number of forced sales, with varying degrees of pressure, is very large and the undertakings affected by them are so important that, for instance, the entire insurance business of the country and the majority of its banking houses and heavy industrial firms are now in German hands.⁷ The attitude of the various Allied Governments to this important problem reveals characteristic differences. The Polish Government has, so far, declared null and void only those confiscations and forced sales whose subject-matter constitutes property of Polish subjects—a somewhat surprising restriction.⁸ The Norwegian Decree of October 3, 1941, only annuls the transfer of rights in stocks and shares of Norwegian companies to foreigners, persons who have acquired their Norwegian citizenship after the date of the invasion not being considered as Norwegian citizens in the sense of that decree. There is no provision in Norwegian law, so far, regarding the forced sale of property other than stocks and shares in Norwegian companies, and there is no provision against the acquisition even of such stocks and shares by Quislings who exploited the situation of the country for their personal benefit. The Czechoslovak Government has stated that it does not recognize and will never recognize the transfer or disposal of any property, public or private, effected since September 27, 1938, under the pressure of the extraordinary political situation or the occupation of the country. But this is merely a resolution by the Government and not technically an enactment.⁹ It is a programme for future legislation, not a legislative act itself. The Dutch Government has not yet dealt with the problem at all. The Government of the Grand Duchy, like the Governments of Belgium, Greece and Yugoslavia,¹⁰ decided to lay down a number of comprehensive rules to make the consequences of their attitude clear to those who should be tempted to take part in the illegal activities of the occupying power. A second decree of April 22, 1941, declares that every infringement of the rights of property,

⁷ See "The Penetration of German Capital into Europe," No. 5 of the Series of Reports on Conditions in Occupied Countries issued by the Inter-Allied Information Committee, London, 1942, p. 15.

⁸ *Drucker*, l.c. pp. 54 ff.

⁹ 24 *Jour. Comp. Leg.* (1942), p. 129.

¹⁰ On the Belgian decrees of January 10, 1941, *Moniteur* vol. pp. see below. For Greece, see Emergency Act, No. 3,066—1941, "Measures for the Defense of the National Economy against the Acts of the Enemy" and for Yugoslavia Standing Order for the transfer and disposal of property in the Kingdom of Yugoslavia after April 6, 1941, dated May 28, 1942.

whether belonging to the State, the communities, public bodies or private individuals, which has taken place since May 10, 1940, is wholly void and ineffective. The nullity extends not only to confiscations and seizures, but includes forced sales and every other measure constituting an infringement of proprietary rights in the widest sense of the term. An action for restitution lies against every person having such goods in his or her possession. The plaintiff is not bound to compensate the defendant for the price which the latter has paid. The action is therefore not based on unjust enrichment, but is a proprietary action for the restitution of the plaintiff's property to the defendant. The defendant, however, may have the right to claim damages from his vendor on the ground that the latter failed to transfer a valid title to him and this right is expressly reserved in the decree. The action for restitution must be brought within three years from the conclusion of the peace treaty. It is obvious that the restitution of property will result in considerable economic changes and it is obviously desirable that these should be terminated as quickly as possible. A period of three years appears ample time within which *bona fide* claimants may put forward their claims. On the other hand, persons who have taken part in the irregular measures taken by the occupying power or who have bought, sold, accepted or given away any property which forms the subject of these irregularities will be punished. The punishment provided by the decree corresponds to the limits set to the Government by the law of September 28, 1938, i.e., the maximum period of imprisonment is three years and the maximum fine 20,000 francs. The Courts of the Grand Duchy are given power to deal with violations of Luxembourg property without regard to the place where they have been committed and even in cases in which the accused cannot be found in the Grand Duchy. This rule applies to prosecutions only; it is not a rule of private international law.

The two Luxembourg decrees of April 22, 1941, follow with a few minor alterations the course adopted by the Belgian Government in two decrees of January 10, 1941. The first of these decrees is a literal reproduction of a Belgian decree of May 31, 1917. It is obviously of advantage that in this way the experience made during the liquidation of the results of the last war is being made available once more. The economic ties between Luxembourg and Belgium also justify the close approximation between the two legal systems on questions with which the Courts of both countries will be concerned. On the other hand, the problem is of infinitely greater magnitude in the present war than it was in the First World War. Especially the number of forced sales is beyond comparison with anything experienced then. It will be clear that the law as in force at present in both countries will require very considerable additions and amendments. In many cases the original property will not any longer be in existence. Businesses have been dissolved, companies merged, goods sold abroad to Germany or even to neutral countries. It may be doubted whether the ordinary civil law, especially the law of delicts and of unjust enrichment, will possess sufficient flexibility to be capable of adaptation to the complexities of the position. In many cases persons who have spent years in exile will be unable to prove their ownership or to finance a costly lawsuit. Above all, very difficult problems of the law of conflict of laws will arise. It is therefore submitted that the whole problem should be considered as a question of international importance. It may well be found to be a question which should be the subject of an international agreement between the United Nations with a view to secure uniformity of treatment, a precise delimitation of the jurisdiction of the individual national courts or tribunals and—last but not least—an effective execution of any judgments rendered against persons residing in Axis and neutral territory.

¹¹ *Schweib*, 24 *Jour. Comp. Leg.* (1942), p. 124.

DELEGATED LEGISLATION IN THE UNITED STATES

[Contributed by SIR CECIL T. CARR, LL.D.]

REMEMBERING Curran's exhortation to eternal vigilance, democracies must periodically test the brakes by which they can control the executive element in the State. Thus in Britain the Committee on Ministers' Powers examined in 1929 the complaint that the executive juggernaut had forced its way into the legislative and judicial gardens. Similar inquiry was later undertaken in America both in the Federal system and in that of at least one of the separate States. On neither shore of the Atlantic did the investigation drag any sensational scandal into the light; nor have the nations in consequence adopted notable new safeguards in any panic-stricken haste. Meanwhile the advent of global war has postponed consideration of the ideal braking apparatus. The executive is adjured to go full speed ahead for victory at whatever temporary sacrifice of liberties. In the United States the President's vast powers as Commander-in-Chief come into play. As the search for safeguards must be resumed in normal times, we may take note of exploratory work accomplished in Washington and New York. Constitutional divergencies, of course, may exclude the applicability of a common remedy. A single instance will illustrate the differences. In Britain a primary control of delegated legislation is the Parliamentary insistence on opportunities of scrutinizing, approving or rejecting the rules and orders made by departments. Any statute which authorizes these departmental rules to be made will usually require them to be laid before Parliament. Apart from other facilities for attacking the Minister responsible for them, the parent statute will usually empower either House to move, within forty days of the laying, a resolution for their annulment; occasionally (especially if the rules or orders tamper with the text of an Act) the statute will provide that they shall not take effect until approved by resolution of each House. But in the United States, where the President and his Cabinet cannot be members of the legislature, the analogy of this British system of Parliamentary control is not found persuasive. Rarely, as we shall presently see, is delegated legislation required to be laid before Congress, whether for approval or rejection or merely for information.

For the British student who makes bold to study the position in the United States the historical background creates an initial obscurity. In a country where so much is heard of the separation of the executive, legislative and judicial powers, how can the legislature delegate a law-making function to the executive? On July 4th, 1776, the third Continental Congress issued the famous Declaration of Independence. Announcing that the colonies were now independent communities, it invited and authorized them to form their own constitutions accordingly. Montesquieu's belief that political liberty depended on the separation of powers was in harmony with their own recent conviction of the tyranny of a centralized government. Already in June the Virginia Bill of Rights had included an article asserting that the legislative and executive powers of the State should be separate. In 1780 the Massachusetts Declaration of Rights made its classic exposition:—

"In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them—to the end that it may be a government of laws and not of men."

The pioneers who, in the several States, framed and operated such principles of government in those formative years were the men who, in the four-month session of the Federal Convention in 1787, hammered out the constitution of the United States. In that Constitution the three powers were definitely distributed; "all legislative powers herein granted" were vested in Congress, "the

executive power" in the President, and "the judicial power of the United States" in the Supreme Court. But the three were not expressly separated. The Federal Constitution nowhere forbids the delegation of legislative power. The very first article, it is true, creates an implication: "All legislative powers herein granted shall be vested in a Congress of the United States. . . . The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." John Locke had written, a century earlier, that the first and fundamental positive law of all commonwealths was the establishment of the legislative power, which is "sacred and unalterable in the hands where the community have once placed it." Those words echo down the years. In 1935 the New Deal involved the executive in a clash with the judiciary, to the confusion of the President's policy for restoring prosperity. The National Industrial Recovery Act, reciting its objects in its forefront, delegated temporary power to the President to approve codes of fair competition. These codes, produced by the hundred for various industries from banking to the manufacture of powder-puffs, provided for minimum wages, maximum hours, and collective bargaining; they prohibited child labour and regulated trade practices. When the Supreme Court presently made history by declaring the delegation of legislative power to be unconstitutional, Chief Justice Hughes observed that "the Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." He recalled an earlier pronouncement by the Supreme Court¹ when it emphatically declared that the principle that "Congress cannot delegate legislative power to the President" is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

The Chief Justice was delivering the majority opinion in *Panama Refining Co. v. Ryan* (1935: 293 U.S. 388), the case about "hot oil," i.e., petroleum in excess of the quotas prescribed by State authority under the Petroleum Code. Mr. Justice Cardozo, dissenting, cited precedents. In 1794 Congress had authorized the President to make regulations for laying an embargo on ships. In 1799 he had been authorized to make orders remitting and discontinuing the restraints and prohibitions involved in the statutory suspension of commercial intercourse with France. In 1897 the Secretary for Agriculture had been empowered to make rules and regulations for forest reservations. By a statute of 1922 the President was allowed to raise or lower tariff duties so as to equalize the difference between the cost of production at home and abroad. With these authorizations the Supreme Court had not interfered. The decisions showed that "the separation of powers between the executive and Congress is not a doctrinaire concept to be made use of with a pedantic rigour."

A limited delegation had indeed been tolerated. Chief Justice Marshall allowed it "to fill up the details" where the legislature had laid down general provisions. "The Constitution," to quote again from Chief Justice Hughes in the Hot Oil case:

"has never been regarded as denying to the Congress the necessary resources of flexibility and practicability which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy, as declared by the legislature, is to apply."

When in 1897 a statute of Congress authorized the Secretary of the Treasury, with the advice of experts, to "establish uniform standards of purity, quality, and fitness" for imported teas, the Supreme Court said that Congress had fixed a primary standard (obviously inferior teas were to be excluded) and had left to the Treasury "the mere executive duty to effectuate the legislative policy declared in the statute." Congress, in fact, had taken the matter as far as it could and had

¹ *Field v. Clark* (1892), 143 U.S. 649.

left to executive officials the necessary duty of bringing about the result to which the statute pointed.

It would be temerarious for an Englishman to attempt to chart the maze of American decisions in this field. Three of the New Deal cases, however, though they may now seem ancient history, are outstanding; embers, apparently long dead, flared up suddenly when the constitutional propriety of delegating legislative powers was challenged in 1935. In the Hot Oil case, where Congress had authorized the President to restrict the transport of petroleum in inter-State or foreign commerce, the trouble was that the statute failed to establish any criterion to guide the President's course; it "permitted such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive officer executing a declared legislative policy." When in the same year the Live Poultry Code was challenged in *Schechter Corporation v. U.S.* (295 U.S. 495), the Supreme Court unanimously denounced the delegation; it was, in Mr. Justice Cardozo's words, "delegation running riot." If in the Hot Oil case Congress had defined the subject but omitted to define the standard, in the *Schechter* case it had not even defined the subject. Lastly, in 1936, delegation was upset for the third time because not entrusted to proper authorities (*Carter v. Carter Coal Co.*: 298 U.S. 238); this was "legislative delegation in its most obnoxious form, for it is not even delegation to an officer or an official body, presumptively disinterested, but to private persons whose interests may be, and often are, adverse to the interests of others in the same business." It was "an intolerable and unconstitutional interference with personal liberty and private property." In Britain, of course, if the delegation were authorized by Act of Parliament, it would be judicially unassailable. Our judges have only to interpret and apply a statute; they have not to refer to any over-riding fundamental document with a view to deciding whether the statute is valid. If this comment be not too elementary, it may be added that, in the United States, even where delegation of legislative power has been deemed valid, it may nevertheless be declared void if the rule-making body has gone beyond the powers of the enabling statute. In other words, there is the same judicial control of *ultra vires* regulations as in Britain. And, like Federal rule-making, the making of rules by departments within the separate States is liable to be held invalid either on constitutional grounds or because it is deemed *ultra vires* the enabling statute.

To come, after this lengthy exordium, to the recent examinations of delegation in the United States, it may be sufficient to mention four.

(a) In 1936 President Roosevelt appointed a small "Committee on Administrative Management in the Government of the United States," with Dr. Louis Brownlow as chairman. The fifth of the published studies prepared for it, "The Exercise of Rule-making Powers," by Professor James Hart of the University of Virginia, is the work of an eminent authority.²

(b) In 1939 the President asked his Attorney-General to set up a committee to investigate "the need for procedural reform in the field of administrative law" and to suggest improvements. Mr. Dean Acheson was its chairman. Its report, issued in 1941, was mainly concerned with the procedures of adjudicating bodies, but devoted some pages to administrative rule-making. It crystallized its recommendations in the form of a draft Bill. A minority of the committee added further views and a different Bill.

(c) These two Bills, with a third which was understood to embody the suggestions of the American Bar Association, were referred to the United States Senate "Committee on the Judiciary." Public hearings, before a sub-committee of that body, followed—an interesting stage in the framing of legislation at Washington for which British practice has no general equivalent. Representatives of many

² See, further, his *Ordinance Making Powers of the President of the U.S.* (Baltimore: 1925), his *Limits of Legislative Delegation* (Annals of American Academy of Political and Social Science: 1942), and chapter 8 (Rule-making Powers) in *An Introduction to Administrative Law with Selected Cases* (New York: 1940).

departments, boards, and commissions, their counsel, professors of law, legal practitioners, and heads of commercial and trading organizations were heard. Their evidence filled five volumes.

(d) To turn from the Federal field to an important inquiry within a single State, the report which Mr. Robert M. Benjamin submitted at the request of Governor Lehman in 1942, on administration adjudication in the State of New York, found room for some well-considered observations on the control and publication of departmental legislation.³

In Britain the Committee on Ministers' Powers found no difficulty in dividing its inquiry into two distinct parts, administrative law-making and administrative judging. Legal philosophers like Montesquieu and Blackstone were perhaps more anxious about the first of these; they disliked any system under which the same authority both made and enforced the law. Modern American investigation has perhaps been more anxious about the second; concern is felt over the departmental tribunals set up by the executive to carry out its policy. With this second branch of the inquiry—the department's power to initiate proceedings against citizens or trading groups in its own forum and under its own imperfectly-understood procedure, the prosecutor-judge combination and the prospect that the department will be "judge in its own cause"—we are not here concerned.⁴

In classifying delegated legislation American investigators distinguish two types—"substantive" and "interpretative" regulations. American "agencies" (or, as we should say, departments), in addition to exercising expressly-authorized powers of making regulations having the force of law, may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authority to do so. Thus the Treasury announces rulings under the tax laws which operate as precedents. Some agencies refer to hypothetical facts and give generalized opinions upon what they regard as lawful or unlawful. Some issue interpretations in general terms rather than rulings upon particular facts; the authors of these will often, but not always, be careful to distinguish them from legally-binding regulations which have the force of law. The business man would like to know in advance how far he can go without illegality. Mr. O. R. McGuire, chairman of the American Bar Association committee on administrative law, put an illustration to the Senate sub-committee. A company which sells candy goes on for years putting a cent or a dime inside some of the sweets so that school-children buy them in the hope of getting some of their money back. The manufacturers build up their factories and their business on that basis and cannot understand why they should suddenly be "jerked up" by the Federal Trade Commission and charged with unfair competition. The case goes up to the Supreme Court and the Commission's attitude is upheld. Mr. McGuire feels that Congress might have required rules and regulations to be made which would expand the statute about unfair competition and define its scope. Then a lawyer could advise his clients with more confidence. When the Federal Trade Commission was first confronted with the proposal to give advisory opinions in advance, it invited the views of eminent counsel. Among others the late Mr. Louis Brandeis (not then yet raised to the bench) thought the plan most dangerous; the public would be tricked and the Commission hoodwinked. It was an impossible task to advise business men how near they could walk to the edge of the precipice without going over. Within their own limits, nevertheless, "interpretative regulations" are evidently important in America. They can be challenged in court and will be rejected, even though of long standing, if deemed to conflict with a clear and unambiguous statute. But the American courts do pay great deference to them, especially when they have been followed for a long time. Upholding some

³ Footnote to an *Investigation*, Fordham Law Review, May, 1943, p. 171, by Mr. Francis H. Horan, Counsel to the Benjamin Commission, gives a pleasantly intimate account of its close-up study of the work of the agencies.

⁴ For an attempted discussion of administrative adjudication in the United States see the *Law Quarterly Review*, October, 1942, p. 487.

regulations of the Commission of Internal Revenue in 1930, the Supreme Court said that "it is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."

It has already been mentioned that Washington is not allured by the precaution that rules or regulations be laid before Congress with a view to approval or rejection. The plan, says the Acheson Committee, has not been successful where tried. "The whole membership of Congress could not be expected to examine the considerable volume of material that would be before them. Even a joint committee entrusted with the task could not supply an informed check upon the diverse and technical regulations it would be charged with watching. . . . Experience, both in England and in this country, indicated that lack of desire, rather than lack of opportunity, has accounted for the absence of legislative interference with administrative regulations"—a statement which an industrious group of legislators at Westminster might ask leave to challenge. Since, however, the Acheson Committee believes that both Congress and the public ought to know what goes on, it recommends that each department should be required by statute to make an annual report to Congress of its rule-making in the past year, with a summary of the proposals emanating from outside the department which were not acted upon or were rejected. Writing of the arrangements in New York State, Mr. Benjamin does not advocate adopting the English method of Parliamentary supervision. He prefers corrective control by means of ordinary direct legislation if subordinate legislation is found unsatisfactory. A State legislature, of course, may not be in session for more than three or four months in a normal year.

Washington, all the same, has occasionally tried the method with which Westminster is familiar. A Federal statute of 1934 authorized the Supreme Court to prescribe rules of procedure in civil matters for the district courts of the United States, provided that the rules do not take effect until the Attorney-General has reported them to Congress at the beginning of a session and until the end of that session has been reached. Another Act, in 1939, empowered the President to make plans for the reorganization of departments. The plan must be transmitted to Congress and does not take effect until 60 days later, and then only if the two Houses have not, during that period, passed a concurrent resolution expressing disapproval. In both these cases, by the way, the delegated legislation is allowed to repeal existing statutory enactments to the contrary—a power which, being exceptional, may be deemed to require exceptional controls.

If government is to be by consent of the governed, the persons and interests affected by delegated legislation should somehow be persuaded to participate in the framing of it. Professor James Hart has drawn attention to the possibilities of such procedural safeguards as advisory committees, notice, and formal hearings, publication of proposed regulations, informal contact with groups concerned, and progression from voluntary to mandatory standards. In Britain, before a department makes regulations, it will, out of a prudent desire to meet criticism half-way, consult the organized interests likely to be affected; sometimes the enabling statute expressly enjoins this prior consultation. Mr. O. R. McGuire, writing in the *Georgetown Law Journal* in March, 1938, complained that "it is almost an unheard-of procedure in American administrative law for the interested public to be given an opportunity for hearing and consultation preliminary to the drafting of regulations and orders." The Acheson Committee, however, shows us that agencies in the United States are often directed by statute to hold hearings before making regulations, and that others do so without any statutory obligation. The Committee commended this voluntary practice; it advocated public hearings and proper notice of them; the notice should indicate the purport of the proposed regulations. Mr. Acheson himself, in his evidence before the Senate sub-committee, gave the agencies full credit; he thought they "leant over backwards in holding hearings." Mr. Benjamin did not press strongly for hearings in the State

of New York. He wants to give people the chance of co-operating in departmental law-making, but is aware of the danger that some interests may seem to have been allowed fuller participation than others. Persons who attend public hearings, he thinks, are reluctant to speak at length; if they overcome their hesitation, they tire their hearers with views which may be neither well informed nor relevant.⁵ Mr. Acheson favoured informal conferences and frankly admitted an official's limitations. "You never quite know, when you are sitting in a Government office, whether a rule which looks perfectly fair and perfectly all right may not strike the citizen as being quite the reverse. . . . If he has a chance to come and tell you about it, you may say to yourself 'My goodness! I never intended in a thousand years to produce that result.'" Besides, he adds, a citizen likes to come along and just blow off steam. The Bureau of Marine Inspection and Navigation had to draw up new regulations about the construction and use of tankers. It announced that it would hold hearings, it promulgated its tentative draft, it held the hearings, amended its draft and held more hearings, and finally put out its regulations and made them effective. It happened that in Louisiana a company owned two or three wooden tankers for river and coastal voyages, the only ships of the kind in the country. The Bureau was unaware of the wooden vessels; the company was unaware of the Bureau's hearings and drafts, and awoke to find that the regulations had destroyed its business. The vast size of the Federal continent, and the variety of its commerce and industry, must make successful prior consultation far harder than in a compact and unitary island like Britain. A herring fisherman from Alaska complained before the Senate Sub-committee of the way in which the Department of the Interior fashions its fishery regulations. The Fish and Wild Life Service, he said, has a programme of scientific inquiry; the staff to study 2,000 miles of Alaska coastline is one man operating on a budget of less than 1,500 dollars a year. The Service holds hearings, but refuses to disclose its materials or its proposed measures. "As a result the formulation of regulations is pretty much by guess and by God."

Such instances support the plan of deferred effectiveness which the Acheson Committee recommended. At Washington, it seems, the Department of Agriculture puts out a rule and announces that it will take effect at a distant date. Some of the rules about grain classification were before the public for a year before they went into operation. In the interval the interested associations and organizations discussed them and the draft was pulled into shape. Many Federal laws arrange for a delay of from 30 to 90 days. The Acheson Committee favoured a general statute for delayed operation, but it recognized that there must be an escape clause for urgent occasions. Some orders must take effect at once—e.g., emergency directions to railways in the event of shortage of rolling stock, or reduced rates for transport of food in time of drought or flood. Prior secrecy may be essential, if, for instance, it were necessary to requisition stocks of coal. Faced with a proposal that departmental legislation should not operate until officially published, a representative of the Board of Civil Aeronautics told the Senate Sub-committee that it ought not to be prevented from protecting the lives of passengers on aeroplanes on Saturday, Sunday and Monday merely because, when it adopted a safety regulation on Friday afternoon, the regulation could not be officially published till the following week.

Standardization of rule-making procedure is not easily attained, but Congress has striven to attain it. At the end of 1940 the President vetoed a Bill (H.R. 6324) which insisted that rules, regulations and orders "of general application" issued by the Federal administration in the United States should not take effect until after the following stages: official notice fixing the date of a public hearing not less than ten days later and setting forth the proposed text, approval by the department, and official publication within ten days of approval. An exception might be made when the President declared that a public emergency existed. The

⁵ Mr. Francis Horan, *op. cit.*, at p. 174, furnishes an illustration.

Bill also required all rules to be issued within a year after the enactment of the enabling statute, subject to the subsequent adoption and further rules from time to time—a curious provision criticized by the Attorney-General in an analysis of the Bill appended to the President's veto message to Congress.

Something should perhaps be added about the process of official publication. In Britain we have had the *London Gazette* which began life as the *Oxford Gazette* when the court left London because of the plague in 1665. And for fifty years we have worked the scheme of publishing officially registered "Statutory Rules and Orders" under section 3 of the Rules Publication Act. At Washington the President's orders and proclamations (usually called "executive orders" because made by the executive) were filed in the department of the Secretary of State. There was, however, no system of publication until 1935, when a disquieting uncertainty about the existence of an order mentioned in the Hot Oil case had shown the need of some compulsory system.⁶ The Federal Register Act of 1935 requires all proclamations, orders, rules and regulations "having general applicability or effect" to be deposited in the office of the Federal Register; until thus filed, they do not operate. After deposit they are promptly printed in the Register, which, collecting the current output of the agencies, appears daily except on Sundays and Mondays. The conduct of the Federal Register is entrusted to a division of the National Archives Department, the equivalent of our Public Record Office. Professor James Hart thinks that the Register would be more useful to the public and the agencies if the President dissuaded the editorial committee from cluttering up its pages with notices of hearings and with other non-legislative matter, and if he persuaded them to change its form from a collection of miscellaneous regulations printed up together to a "ring-binder series" of separate slip-form regulations. The Brownlow Committee on Administrative Management endorsed this suggestion. Professor Hart also thought that explanatory memoranda might be prefaced to the documents. The practice of adding explanatory footnotes and memoranda to Statutory Rules and Orders has been markedly developed in Britain during 1943. Some Federal agencies publish their regulations separately in pamphlet form. Thus the Bureau of Plant Quarantine sends out its regulations to firms on a mailing list, together with an explanatory memorandum in simple language and a receipt to be signed so as to ensure that the firms have notice. The care-free maxim that ignorance of the law excuses nobody is not enough to rely upon when the community is using the weapons of modern science against diseases of human beings, animals and plants; the administration must do its best to bring the law to the notice of all whose default may bring danger to others.

The separate States have different devices and standards of official publication. "It is not unknown," says a writer on this subject, "for a departmental rule, one which is used daily and which affects a large number of enterprises, never to be committed to paper."⁷ This must surely be unusual. The State of Oregon requires all rules to be deposited with the Secretary of State if they are to be effective against a citizen without actual notice. Tennessee and Ohio have a somewhat similar law. Massachusetts requires the annual reports of State officers and departments to include a complete list of all their rules and regulations. In New York State "No rule or regulation made by any State department . . . shall be effective until it is filed in the office of the Department of State; the legislature shall provide for the speedy publication of such rules and regulations by appropriate laws." Filing is, of course, one step towards ensuring public knowledge, but its practical use may be slight. Personal examination of filed regulations, says Mr. Benjamin, occurs on an average less than once a month, written inquiry perhaps two or three times a month. People

⁶ See Professor Erwin N. Griswold's *Government in Ignorance of the Law*, Harvard Law Review, xlviii, p. 198.

⁷ C. C. Moreland, "State Administrative Rules and Regulations," in *State Government*, March, 1942, at p. 60.

inquire not so much in order to find out the law as to satisfy themselves that a known rule or regulation has been duly filed. He criticizes, by the way, the method of keeping the files; superseded regulations are not removed, and there is no systematic indexing. In 1939 the State legislature passed a Bill requiring administrative codes, rules and regulations to be compiled and published under the supervision of the Director of the State Library (the Education Department). The Department of State, the Education Department and the acting Director of the State Library all opposed the approval of the Bill, and the Governor vetoed it. There seems to have been no fresh legislation since. On the whole, Mr. Benjamin thinks, there is no difficulty in finding out the existing regulations. The Department of State issues a monthly *New York State Bulletin*; he considers this would be a convenient medium for publishing new and amending regulations. He thinks it would be impracticable for the State to undertake a daily publication comparable to the Federal Register; even a system of loose-leaf prints (like the Statutory Rules and Orders of Whitehall) might be too expensive to produce and distribute at frequent intervals. Legislation about publication, in his opinion, should provide for filing a comprehensive statement of all rules and regulations (and periodical supplements) in the office of every county clerk for public inspection, and for distributing copies to colleges and universities and public law libraries. He would like a stipulation that the issuing department should always specify the statutory authority under which it purports to be making its rules and regulations. Not to prolong the catalogue of State arrangements, the Wisconsin Red Book, published under a statute of 1939, contains all procedural rules, standing orders and regulations which have the force of law; California has a periodically published Administrative Register. In some States, it appears, the editing of such publications falls to the lot of the revisor of statutes.

The duty to publish, therefore, is seen to be enforced in America more firmly than in Britain, where a recommendation by the Committee on Ministers' Powers that publication should be a condition precedent to effective operation has not yet received the attention of Parliament.⁸

On the general issue of the propriety of delegating the power to legislate, the United States would seem to have acknowledged delegation (as did the Committee on Ministers' Powers) to be inevitable. There is evidence in America, even more than in Britain, that these periodical inquiries into the working of administrative laws have a great practical value. The investigated departments show themselves ready to adopt suggestions for a voluntarily improved procedure, while the bitterest critics of bureaucracy abate some of their violence and suspicion as they learn more of the facts. Enough of criticism will still remain to warn civil servants against the quintessential fatuity of complacent satisfaction with supposed perfection of method. On both sides of the Atlantic the public will be vigilant to insist that temporary delegations, essential for the successful conduct of a world war, be not unduly prolonged when peace returns.

LEGAL EDUCATION.

[Contributed by CAPTAIN R. H. GRAVESON, Ph.D., S.J.D., LL.M., R.A.S.C.]

THAT the *Columbia Law Review* should devote almost the whole of its May, 1943, issue to a survey and critique of certain American methods of legal education underlines the importance which American Law Schools attach to this problem. The various methods of scientific teaching of law in the United States raise heated controversy over a problem of which few English lawyers are even conscious; and while the five Review articles included in that journal are in no way comprehensive, they constitute a serious, if limited, attempt to define the object of

⁸ For the official publication of proclamations and Orders in Council of the Dominion of Canada and of the rules and orders, etc., of Ontario and Nova Scotia, see an article by Mr. Eric H. Silk, K.C., in the *Canadian Bar Review* for September, 1942.

law teaching and the best means for its achievement. From the American point of view the most notable omission from this collection of articles is a statement of the Case System of teaching. However fully it is realized that this method is largely discredited in Columbia, the absence of a contribution from an advocate of the well-tried case system, which eminent law schools such as Harvard are still sufficiently misguided to use, raises on the part of Columbia a justifiable suspicion of evasion. The composite picture has an unmistakable tilt. The English lawyer, on the other hand, may be forgiven if he shows some slight surprise that a combined discussion on methods of teaching law should omit all reference to straightforward lecturing as a rather obvious means of imparting information. For the most part, lecturing, such as we know it, was superseded in American Law teaching at the end of the last century by the case system, which in its turn many now consider obsolescent. While we may properly wonder why we have not yet received such enlightenment, we may also acknowledge the coincidence which has enabled us, as it continues to do, to maintain a not discreditable standard of legal proficiency.

Let us admit, however, that into the teaching of law in certain English universities a facile and fatal complacency has crept. Let us admit the intense conservatism of our profession. Let us acknowledge that a long tradition such as ours involves fetters which bind as well as foundations on which to build. Then let us learn from the experience and experiments of America such methods of legal education as may infuse new life into our own system. In the field of legal teaching let us be ready, if necessary, for a legal grafting of ideas and transfusion of the life blood of legal thought.

The Object of Law Teaching.—The basic purpose of legal education is the production of lawyers. Dissension on this basic purpose arises only on the kind of lawyer we wish to produce—should he have a general training, knowing a little about everything and not very much about anything; or should he be a specialist in a modest degree in at least one field into which his post-graduate activities are likely to lead him? Should he be an encyclopædia of legal data, or a man with a mind trained to reason from first principles which he can bring effectively to bear on any given set of facts through training in the “applicational transfer from decided cases to new situations”?¹ Finally, must not a lawyer be far more than a repository of legal rule and principle? The social and often legislative duties of a practising lawyer call for an ability to fix and follow a policy based on non-legal as well as legal considerations. Ability to do this demands a wider background than mere legal training can provide. The modern lawyer must be an “officer of civilization.”²

Llewellyn, in revolt against the American multiplicity of courses, sees in the resultant mental indigestion the antithesis of the needs of modern society, which call for specialization.³ The division of labour characteristic of modern life cannot be excluded from the legal profession. But it is self-evident that any such specialization in legal training must be very limited in scope. The law student needs a general foundation of legal knowledge. Before he goes out into the field of practice he has little knowledge of whether he will be called upon to specialize, and if so, in what branch of law. Specialization comes in practice through trial and error, opportunity and experience. To force it in student days beyond the limited extent founded on the law student's special interest in one or another branch of law would in many cases be both a waste of time for the future and of opportunity for the present. The lawyer of to-day, faced with the legal problems of international dimensions, must have an extra-legal background, a comparative general legal training and a specialized knowledge of the branch of law with which he most frequently deals in practice. The first is the function of pre-legal training. Its obvious contents of constitutional history, principles of economics, political science and an outline of how the country is governed are

¹ “Education for Law Teachers,” xliii *Col. Law Rev.*, 442.

² “A Lay View of Legal Education,” xliii *Col. Law Rev.*, 463.

³ “The McDougall-Lasswell Plan,” xliii *Col. Law Rev.*, 480.

outside the scope of an article on legal education. They are not purely pre-legal, but pre-any professional training.

General training on comparative lines is the function of legal education. The need for some knowledge of the legal system of at least one other country may not easily be apparent. Its value lies in combating the insular attitude in a world in the melting pot of reorganization; in developing a consciousness of the qualities of other legal systems, a power of judgment and appraisal, and an ability to cope with problems of private international law. Comparative law should not primarily be a specific course—it should be a natural element of all courses, comparison of rules of law forming an integral part of teaching any branch of English law. At the present time only a minute percentage of English lawyers have the slightest perception of the law of Scotland. If it can be said of most American law schools . . . “this field (comparative law) is either neglected or is represented by a moth-eaten course in Roman Law,”⁴ could more, or should less, be said of England?

Of specialization, so far as it affects the normal student, practice itself provides the best source of supply for its own demands.

Do Law Teachers know how to Teach Law?—Law teachers, though the best of lawyers, may be the worst of teachers. Some of them are. The techniques of the two professions are quite distinct; and there is no justification for the assumption, which law teachers generally make of themselves, that ability in one connotes ability in the other. Law teachers as such are untrained, save through the hard school of experience. There is, at least, a *prima facie* case for study by law teachers of how students learn and how best they can be taught. Weihofen's article⁵ on this subject contains a number of pointers of value based on the study of the law student's mentality. The need for an incentive to study is fundamental, but it is not a need the satisfaction of which necessarily falls on teachers. Even though, as Llewellyn points out,⁶ the normal student learns slowly and not without difficulty, he is sufficiently aware of the purpose of his legal education to give him adequate incentive to qualify legally. In spite of the opinion of despairing lecturers, the law student is sufficiently mature to have the will to learn, a will which must be fostered by intelligent teaching. No small part of this lies in personal interest and personal contact between teacher and student. Praise or censure of a student's work is infinitely better than indifferent disregard. But sarcastic criticism is always unfair and often disastrous. Always before the student should be kept the ultimate goal of becoming a well-qualified lawyer, a goal not to be confused with, or obscured by, the immediate need of passing examinations. Paradoxically, this can be achieved by increasing the frequency of progress tests. The advantages of such tests are: (1) they enable the teacher to maintain an up-to-date record of each student's progress; (2) they provide an element of initiative in the competition between students, and, most important (3) they provide each student with a current knowledge of his own progress, so that in successive tests he enters into competition with himself in attempts to improve on his previous results.⁷ Frequent tests of this kind, when combined with continuous personal contact between student and teacher, would become so much a part of a law course as to be taken in the student's stride, and so representative of a student's pin-pointed progress as to obviate the need for any other form of formal qualifying examination for a degree, except in borderline cases. Thus one of the obstacles to the fullest operation of the incentive of legal practice, the ordeal of a final degree examination, would be removed.

Katona⁸ has demonstrated practically the superior efficacy of learning by understanding over learning by memorizing. It is a principle which some law teachers tend to disregard, repeating session after session dreary recitals of data

⁴ “A Student's View—and Later,” xliii *Col. Law Rev.*, 473.

⁵ “Education for Law Teachers,” xliii *Col. Law Rev.*, 423.

⁶ “The McDougall-Lasswell Plan,” xliii *Col. Law Rev.*, 478.

⁷ “Education for Law Teachers,” xliii *Col. Law Rev.*, 427-8.

⁸ Katona, *Organizing and Memorizing* (1940), 9-20, 187-192.

in the form of lectures, and testing results by the quantity of facts retained in the student's mind. Understanding is to memorizing what wisdom is to knowledge. Admitted that while the lecturer can give an explanation, God alone can give understanding, it nevertheless remains true that many explanations give little help to a student in his strivings for understanding of an intricate subject. In this, of all things, the teacher alone can help. While memory is so important, ability to think is more so . . . "learning to think in the sense of learning to apprehend the general principles by which specific data can be organized and understood is more valuable, more adaptable to new problems, and longer lasting than learning by the absorption and memorization of specific data."⁹ The value of jurisprudence and even more of legal philosophy in this connection is very great. The student's mind is automatically centred on ideas instead of facts. He cannot know these subjects without understanding them, at considerable mental effort; and he cannot understand them without deriving in relation to all legal subjects the habit of automatically relating any set of facts to a legal principle.

Some American Methods of teaching Law.—The variety of legal subjects normally taught in a university demands a versatility of technique and precludes the hope, if such it be, of adherence to a single effective method of teaching. For each subject must be found the most profitable means of exposition. A combination of teaching methods adds a variety to learning which greatly enhances interest in the subject taught.

(i) *The Case System.*¹⁰—This well-tried system, based on a classroom discussion of decided cases, is intended to train the student in discrimination between what is relevant to a decision and what is not, to find the principle of decision in legal judgments and to develop a power of criticism of such judgments. Almost incidentally, it also teaches rules of law. The system arose in the late nineteenth century when American law appeared to have reached a state of maturity and the authority of precedent stood very high.¹¹ Precedent holds a very different place in American law to-day. Apart from the acknowledged authority of decisions of the Supreme Court, the single precedent would not justify an American lawyer in predicting for his client what would happen if similar circumstances came before a court of similar jurisdiction. The American seeks for his authority a line of consistent decisions, not a single judgment. The case system of teaching has suffered a corresponding decline, unreasonable because the critical appraisal of a *ratio decidendi* bears no necessary relation to the binding authority of the case as a precedent. Rather should the unmanageable mass of case law which has reduced the value of the single decision increase the importance of training in the handling of this complex body of law.

The case system, embodying a technique of teaching which has in many Law Schools developed into a fine art, has been subjected to criticism as a complete method of law teaching throughout the three years of a normal degree course. Some¹² would use it only in the first year of a law course, maintaining that thereafter it had lost its value; others¹³ advocate reserving it until the final year, when it could better be applied on a foundation of knowledge of basic legal principles. Perhaps the clearest modern tendency in American teaching is to combine a discussion of decided cases with the application of legal principles to hypothetical situations—the transitional step between the case system and problem method of teaching. Many case-books have for some years embodied hypothetical problems and non-judicial material with the object of bringing law students to regard judicial decisions as something more than authoritative pronouncements, merely to be read and assimilated.

⁹ "Education for Law Teachers," xliii Col. Law Rev., 430.

¹⁰ See Kenny. "The Case Method of Teaching Law." *Jour. Comp. Leg.* (1916), 16 N.S., 182.

¹¹ "Lay View of Legal Education," xliii Col. Law Rev., 465.

¹² "Education for Law Teachers," xliii Col. Law Rev., 445.

¹³ "A Lay View of Education," xliii Col. Law Rev., 465.

One or two observations occur to one in considering the application of the case system to the teaching of English law. The system would necessarily be of more limited scope than in America, for English decisions are fewer and less detailed than American. They leave untouched a tremendous body of private law, the teaching of which could not be built around legal decisions. The corresponding advantage of case-books of manageable proportions, unlike the thousand-page collections of America, would make the system practicable. A year's instruction by this method at the hands of some of its ablest exponents, including Beale and Williston of Harvard, have left two major impressions in the writer's mind: first, that the case system, unless complemented by lectures, gives an atomistic view of law. Secondly, the system produces more capable and confident lawyers than teaching by pure lecturing ever could produce, although the extent of their legal knowledge is necessarily more limited than that of a lecture-taught lawyer. But, bearing in mind the value of understanding and ability to think as against the accumulation of a quantum of legal data, this may not be a bad thing. As an experiment, the case system combined with lectures is well worth trying in English Law Schools.

(ii) *The Problem Method*.—Professor Cavers of Duke University makes an eloquent plea for the Problem Method of teaching law. The method is undefined and not very helpfully described as "just a way of dealing with problems."¹⁴ Its claim to rank as a "method" results from its policy of dealing with hypothetical legal problems, which may or may not arise in fact, as against the case system's dealing with actual legal solutions to past sets of facts. Apart from the extent to which its advocates would apply this method, it contains little new in the way of teaching. The University of London has for years followed almost exclusively the same plan in "tutorial" classes of the second and third year of law courses, and the value of the system has been amply proven by experience. A useful development which would enhance the value of discussion of hypothetical legal problems has been suggested, namely, the setting of problems not limited to one branch of law, and the assignment of specific tasks to members of a class, such as the drafting of necessary instruments to give legal effect to solutions.¹⁵ The advantage claimed for this method are: (i) students develop analytical keenness; (ii) they achieve a better understanding of the law; (iii) they receive stimulation from a sense of craftsmanship growing in them. The necessary limitation of classes to fifteen students presents fewer difficulties in English law schools than in America, where the case system of teaching is commonly applied in classes of over two hundred students. The problem method, more perhaps than any other, requires close personal contact between student and teacher. It is the teaching of laboratory law, in which the instructor must always be available for consultation at all stages of a legal experiment. The advocacy of this method appears to flow, in part at least, from a reaction against the case system, from which it has obviously developed. "What the problem method can do," Professor Cavers maintains, "is to give the student an opportunity to learn law by using it. In the casebook study of cases, the student is studying solutions of problems, not how to solve problems."¹⁶

These American strivings after a more realistic form of teaching law arise in no small measure from a difference in the requisites of legal qualification. The qualifications for Bar practice in many American States include no practical training such as service of article of clerkship or reading in Chambers. The call of the American student for practical contact with law in action is accordingly all the greater than that of his English counterpart, who is frequently serving Articles of Clerkship at the same time as he is taking a law course. Furthermore, the American law student, by and large, is far more conscious of the need to qualify legally. He is generally older than the average English law student, and in many cases is working on

¹⁴ "In Advocacy of the Problem Method," xliii *Col. Law Rev.*, 478.

¹⁵ *Id.*, p. 457: "A Student's View—and Later," xliii *Col. Law Rev.*, 471.

¹⁶ "In Advocacy of the Problem Method," xliii *Col. Law Rev.*, 455.

menial jobs—selling newspapers or waiting-on in restaurants—to pay the cost of his legal training. Such men have ambition and character. Their demand to get to grips with fighting law is anything but incoherent. It is to the credit of American law teachers that serious attempts are continuously being made to satisfy that demand.

Quite apart from the fact that American law teachers are paid, there are other differences in the two countries which affect the technique of teaching. American lecturers do not normally practise law. Many have never practised. In most English Universities, on the contrary, lecturers are either expected, or at least permitted, to engage in practice during the tenure of their appointments. In fairness it should be said that the primary object of this policy is to enable the lecturer to keep his feet on earth, though his head may be in the clouds. The incidental economic consequence is merely a fortunate by-product of a wise policy which has succeeded to a marked degree in co-ordinating principle with concrete experience in the teaching of law. English Universities may soon be faced with the multiple problems of an influx of post-war law students. Their teaching will require imagination in planning and courage in execution. American methods may contain something of value, something which will meet the needs of a post-war student body better than our present methods. Preliminary experiments in England should indicate the value of those methods. What better time could there be for such testing of techniques than the present, when depleted law classes would allow both time for planning and opportunity for experiment?

SOME AMERICAN VIEWS ON INTERNATIONAL ORGANIZATION

[Contributed by F. N. KEEN, ESQ.]

EVIDENCE accumulates of the wide extent of public thought in the United States to-day on subjects bearing upon post-war international organization.

The *American Quarterly Journal of International Law* for January, 1943, testifies to this both by its numerous reviews of books on such subjects and by some of its articles.

Mr. Charles G. Fenwick contributes a very interesting article giving an account of the activities of the "Inter-American Juridical Committee," set up at the third meeting of Ministers of Foreign Affairs of the American Republics, under the Pan-American Union, held at Rio in 1941. The Committee is a reconstruction, with wider scope, of the previously existing Inter-American Neutrality Committee.

The Committee started by drawing up a statement, based on a project of the Bolivian delegation, on the "traditional" principles of international law. They then considered the question of formulating uniform rules on certain problems arising out of the war, but found it impossible to do more in that direction than take preliminary steps by addressing inquiries to the Governments with respect to legislation and administrative regulations. They then proceeded to the study of post-war problems.

A resolution of the Rio meeting had entrusted them with "the formulation of specific recommendations relative to the international organization in the juridical and political fields, and in the field of international security." They decided that it was inexpedient to attempt to carry out this mandate until agreement could be reached with respect to the fundamental principles upon which detailed plans of reorganization must of necessity be based. It was clear to them that the scope of the post-war international law must be far wider than that of the "traditional" principles; that account would have to be taken of economic and social conditions; and that specific recommendations on international security, involving the precise form of the international organization required and its methods of protection against aggression, could only be made on the basis of certain broader understandings as to the degree of

responsibility to be assumed by the community of nations for the maintenance of law and order, and as to the political, economic and social conditions upon which it would be possible to make any system of collective security effective. They felt therefore that their recommendations should be of a preliminary character, but they drafted a statement of principles which they believed should constitute the basis of a stable international system. The priority of the moral law was reaffirmed; war was repudiated as a legalized procedure; the community of nations must alone have the right to use force; the obligation to settle disputes by peaceful methods must be without limitations or qualifications; a collective responsibility must be assumed for the maintenance of law and order; and the conception of sovereignty must be modified so as to be consistent with the moral unity of the community of nations.

Mr. Fenwick concludes his article with these words: "Only in a world that is organized for the maintenance of law and order can the American States find continental security; only in an international community that is seeking the ends of justice and is co-operating to promote the common good of all can the Inter-American group succeed in advancing the special interests which its members have in common. Continental isolation is now no more possible than is the isolation of individual States. The organization of States by regional groups may come to play an important rôle in the promotion of special group interests; but law and order must be conceived primarily in universal terms if the stability essential even to regional co-operation is to be attained."

In strong contrast with the progressive views of Mr. Fenwick and the Juridical Committee is the outlook of Mr. Edwin Borchard, Professor of Law in the Yale University School of Law, who contributes an article on "The Place of Law and Courts in International Relations." Professor Borchard clings with limpet-like tenacity to the methods and conceptions of the past. He shows great ability in destructive criticism of new ideas and plans, but offers practically nothing in the way of constructive suggestions to afford hope of better world conditions after the war.

He sees international law as necessarily a weak thing, conditioned by the fact that it deals with sovereign, independent States, so he is all for being modest in demands and treading gingerly. He looks upon the Hague Conferences as symbolizing the high-water mark of the trend towards harmony, and thinks that the cold facts of political life disclose a conflict of interests, political, economic and social, which admits of little hope that international law, which depends largely on mutual respect and trust, will soon be restored even to its nineteenth-century influence and prestige. He throws cold water on all ideas of enforcing international law and controlling resort to war by use of collective power, and says that the attractions of organized force, so inherent in municipal law, must be rigorously repudiated in the field of international law.

He thinks that the line of progress lies in the pre-1914 position, which had admittedly to tolerate political "self-help" (i.e., war), while endeavouring to remove or minimize the occasions for its exercise. He even says, in one passage, that "self-help" is "by no means the baseless evil which some theorists have supposed." He maintains that the vital interests of States are not legal in character, and that issues concerning them are appropriate to conciliation, not adjudication. The idea of international legislation as a means of developing international law and securing a just and peaceful regulation of international relations is ruled right out, for he sees the power under municipal law to effect changes in polity by legislation with majority vote as exemplifying a fundamental difference of such law from international law. In regard to international law he thinks that the premise of legal equality requires unanimous consent for treaty change, and that such consent is almost sure to be declined by the party deleteriously affected. He suggests that we should build on the tradition of nineteenth century negotiation of differences and the Concert of Europe, with modern improvements taught by experience.

If victory on the part of the United Nations afforded no better hope than Professor Borchard offers of emergence from past conditions of international lawlessness and provision of real and effective security against future war, the prospect for the human race would indeed be dark and depressing!

The "Current Notes" in the same number of the *American Journal of International Law* record some opinions widely different from those of Professor Borchard. At page 108, for example, Dr. Blanco Uztariz is quoted as advocating that an international police should be established "for the maintenance of international order in the hands of those nations that will shape the world of to-morrow." At page 117 Mr. Robert McElroy says: "Without sanctions, laws represent only what Alexander Hamilton called government by supplication, which has never proved effective, and never can. And international law is no exception; for it, too, sanctions are essential to success." And later he says: "The League of Nations failed to maintain lasting peace chiefly because it could not put sanctions back of laws meant to be international, and the cause of the failure was millions of nationalistic minds. . . . If we can create minds which think in world terms we can employ sanctions which run throughout the world."

In a book of 133 pages recently published by G. P. Putnam's Sons, New York, and entitled *A Permanent United Nations*, Mr. Amos J. Peaslee collects a series of articles written by him at various times on different aspects of international organization. In an introductory "Summary" he says that the protection of the world from the recurring German menace, and the temporary or permanent governing of the German people, should be undertaken by a United Society of Nations as a governmental organization. He holds that the rights of nations which may not be infringed by any superior sovereignty, and which belong to all nations entitled to sovereign status in the international community, should be defined, declared and reserved to those nations, but, subject to such reservation, there should be a great deal more international government; that real power and adequate means with which to exercise power should be vested in a permanent "United Nations"; and that concrete and courageous steps should be taken to erect better international legislative, executive and judicial organs of government. He says: "The chances are excellent that strong democratic World Government would work far better than timid souls believe. Ninety-five per cent. of this planet's population are honest, friendly and reasonably intelligent people. Braggarts, bullies and fiends exist, but they are vastly in the minority. They can cause destruction far out of proportion to their numbers. That is precisely why we must organize more effectively to control them."

In the course of the other papers in his book Mr. Peaslee advocates that the United Nations should form themselves into an organization under a written constitution setting up permanent organs of world government, clothed with effective powers and given adequate means of financial self-support. He wants a legislative body with power to promulgate its own international statutes, freed from the necessity of national ratification; executive organs with adequate machinery for the preservation of the public peace and the promotion of the common welfare; and a reconstitution of the Permanent Court of International Justice, with compulsory jurisdiction, a simplified procedure for selecting the members of the Court, and a complete system of lower Courts, sitting regularly or going on circuit in various parts of the world. He presses emphatically the view that the organization should be clothed with power to collect its own revenues, and thus have the means of self-support. He suggests two sources for the provision of such revenues: first, the levying of indirect taxation through the vesting in the organization of exclusive power of regulating international commerce; and, second, a service charge for the management by the organization of a universal currency on a sound system. Such a

currency, he contends, would be one of the greatest boons that could be conferred upon a harried and almost prostrate commercial world.

He is emphatic also on the need for security for international justice, and says that, just as domestic peace within nations is never stable unless there is an adequate system for the realization of justice, so there will be no permanent peace among nations until there is a complete system for realizing not only a state of calm, but also justice among them. He does not see the need for the entire abolition of national armaments, but looks forward to the delegation of the responsibility for enforcing international law to specially authorized international officials, national "self-help" being permitted so far, but only so far, as it assists in establishing justice and order.

In the *Columbia Law Review* Mr. George Jaffin has made a useful contribution to the development of both international organization and comparative legislation. The April, 1942, number of that Review contains an interesting article by him advocating the comparative study of the constitutional systems of the various countries of North and South America. Weighty reasons are advanced in favour of such a study.

He refers to the fact that the Latin-American republics, although they based their original constitutions on the United States model, did not adopt the Anglo-American common law as the foundation of their private law, and in their constitutional developments have in certain respects departed widely in course of time from the original model. As illustrations of such developments he cites the Uruguayan Constitution of 1934 and the Cuban Constitution of 1940. He thinks the United States may have something to learn from a comparison with the Latin-American constitutions. "After nearly a century of constitutional experience, the younger republics of the New World may be in the position not only of disciples but also of teachers."

He refers also to the great movements for change in the position of American States which are receiving support in certain quarters. First, the movement for an Anglo-American constitutional union, resting upon an appeal to peoples inheriting a common culture, and seeking to unite the English-speaking democracies. Next, the appeal to the Spanish-speaking peoples on both sides of the Atlantic to draw closer together and form a Pan-Hispanic Union, by reason of their common heritage of a similar culture. Next, the idea of some form of constitutional co-operation to embrace the whole of the New World, envisaging the possibility of a Pan-Americanian constitutional confederation. Finally, the possibility of a still more extensive organic combination, perhaps eventuating in a United States of the World, to embrace both the Old World and the New.

Whatever new status may emerge from these various ideas, and whether it be a union confined to the New World or a wider union including the New World, Mr. Jaffin contends that an analysis and comparison of the different constitutions is desirable in order to provide a basis for a common understanding, and to ensure that the constitutional provisions of the component States will be in harmony with those of the super-constitution, and vice-versa.

He makes interesting references in the course of the article to various differences between New World constitutions, in relation, for example, to guarantees for social and economic welfare, and procedures for protecting the constitutional rights of individuals and for testing the constitutionality of laws.

At one point in the article he refers to the common assumption that differences in language, institutions and laws are insuperable barriers to closer constitutional union. He cites Canada and Switzerland as refuting any such assumption, but he ends the article with a statement that barriers separating civilized countries are more easily dissolved when the initial obstacles to common understanding, caused by differences in language, are overcome, and advocates the adoption of "some international mode of discourse."

In a separate publication by the *Columbia Law Review*, dated 1943 and

entitled "New World Constitutions and Constitutional Jurisprudence" Mr. Jaffin makes a further contribution to the comparative study of law. The first part of this is a review of a new work in Spanish containing a collection of the constitutions of the countries of the New World comprised in the Pan-American Union. The second part is described as being probably the first attempt by a legal periodical to apply systematically the Anglo-American case method to the study of comparative law. It is a comparative study of the decisions in a United States case and an Argentine case dealing with the constitutionality of certain legislation of particular States, and involving different interpretations of fundamentally similar Commerce Clauses of the American and Argentine Constitutions respectively.

Seeing how important a part constitutional arrangements and legislative power must play in any effective system of post-war international organization, Mr. Jaffin's plan of preparatory comparison of existing constitutions seems obviously valuable.

A STUDY OF WAR

[Contributed by NORMAN BENTWICH, Esq.]

IN a great, almost portentous, book¹ of some 1,600 large, closely-printed pages is a monument of co-operative research and editorial industry. It is the outcome of a study initiated at the University of Chicago in 1926 by a polymath professor of international law. Over fifty members of the staff and research assistants participated in the study. Their work has been in some cases published in the form of monographs, and the whole, together with other co-operative studies of war, has been digested by Professor Wright. It appears opportunely, or ironically, in the midst of the second world war. The conclusions seem a little banal at this time. "This investigation, begun in the hopeful atmosphere of Locarno and completed in the midst of general war, has convinced the writer that the problem of preventing war is one of increasing importance in our civilization and that the problem is essentially one of maintaining adaptive stability within the world-community, only possible if larger sections of the public persistently view that community as a whole." And again: "So rapid has been the shrinking of the world as a result of inventions in the means of trade, transport, and communication, so rapid has been the acceleration in the rate of social change as a result of the conscious organization of technical and political invention itself, that the problems of functional synchronization and international adjustment have become increasingly difficult. Conflicts are more frequent, more difficult to resolve, more likely to spread."

Arnold Toynbee's *Study of History*, it is clear, has influenced the author. His work is an attempt to cover the same large canvas of time and space in reference to his special theme. He deals with the universal history of war beginning with animal warfare and ending with the functions, drives, and technique of modern warfare. The work falls into four parts. After a short introductory section on the objects, scope, and organization of the study, Part 2 deals with the history of war through the ages; Part 3 with the analysis of war in all its various aspects, political, social, legal, and religious; Part 4, nearly as short as Part 1, with suggestions for the control of war. A series of appendices of specific studies on such recondite subjects as the Nature of History, the Theory of the Unique Origin of War, the Relation between Warlikeness and other Characteristics of Primitive Peoples, the Origin of Modern Civilization, the Analysis of the Battles of Modern Civilization, the Influence of Mechanism on War Costs, the Analysis of War by Economists, Political Scientists, and Social Psychologists, the Relation of Certain Philosophical Linguistic Terms to Group Life, the Relation of National Policies to Types of World Order. These are followed by illustrations or graphs which show

¹ *A Study of War*. By Quincy Wright, Professor of International Law, Chicago. 2 vols. ; pp. 1,525. (University of Chicago Press.)

the trends of opinion in different countries to warfare, the relationship between warlikeness and other aspects of collective life, the duration of the battles through the centuries, and, finally, the probability of war between pairs of states.

The titles of the appendices and the illustrations make the head whirl. They indicate the encyclopædic character of the study; and the chapters of the main text equally illustrate that character. The author is constantly encouraged to embark on excursions from the principal theme and go where the argument listeth, on some large issue such as the character of modern civilization, the struggle of powers, the laws of violence, the measurement of international relations. In this aspect his method is reminiscent of that book of our childhood, "The Guide to Knowledge." One damned thing leads on to another, so that the Study of War contrives to encompass all human endeavour and development.

Inevitably the picture that emerges—if there is a picture or pattern—is rather blurred; and it is more difficult in this *Study of War* than it is in Toynbee's *Study of History* to disengage from the solid pyramid of facts and theories the guiding trend. It must have been a herculean task for Professor Wright to co-ordinate the varied work of fifty specialists, though he is so versatile himself that he has contributed a score of monographs on different subjects of the human conflict. The book inevitably lacks the clear direction of a single mind. It is sometimes overweighted by the mass of learning so that one is conscious of the handicap of too many research assistants. The learned clerks, moreover, tend to wrap up simple things in technical jargon.

The first part of the study offers numerous examples of this professional complication. Thus, at the outset the object is stated as "to clarify the problem of war by exhibiting the relativity of war (a) to history, (b) to the point of view, and (c) to social and political controls." Then he gives a definition of war which produces the following unexpected results: "In the broadest sense war is a violent contact of distinct by similar entities. In the analytic section dealing with contemporary war, a narrower definition is needed. For this purpose war will be considered the legal condition which equally permits two or more hostile groups to carry on a conflict by armed force." Later we find a definition from a different angle. "From the standpoint of all belligerents war may be considered a simultaneous conflict of armed forces, popular feelings, jural dogmas, and national cultures so nearly equal as to lead to an extreme intensification of each." Yet war seems more intelligible if we take it as axiomatic without structure of words and concepts.

Again, in dealing with public opinion, a learned footnote tells us that major peace propaganda arose in Palestine during the Assyrian invasion (for which Micah and Isaiah are the authorities); and that fact of Bible history is set by the side of peace propaganda after World War I, for which the authorities include Nicholas Murray Butler, Lord Bryce, and Norman Angell. It is a little strange, again, to find the observation that, "while war manifests the weakness of the community of nations, it also manifests the existence of that community." The simple fact that war from being tribal in primitive society has become world wide in our day is wrapt up in the following sentence: "It is important to have in mind that the rise of communication and transportation in the present period has enlarged the block of time and space which must be considered. Adequate explanation of warfare among a group of Australian aborigines might be found in the materials of a small area and a brief history, but to-day the politics and economy of the civilized states are so intertwined that materials from all over the world and from a long history are relevant."

The problem is set "within a definite biological, geological, and astronomical milieu." Of course it is, and the Americanism thrusts itself on the reader—"And so what." The facts collected are deeply interesting for themselves, and the reader is constantly rewarded with fresh and novel information such as is gathered by the learned writers of the 17th century, Selden and Burton.

It would, however, be unjust to suggest that elaborate study and the amassing of facts from every age and every science had not given illuminating conclusions. At the end of the *Study of the History of Warfare* we learn: "Civilized war, like primitive war, has been a conflict between two armies, between two populations, and between two societies, but it has also been a conflict between two ideas." The general acceptance of "modernism," by which the author means humanism and liberalism, would offer the possibility for the peaceful solution of every controversy by dialect. The most important generalization about the function of war in the modern world is "a more widespread opinion than in any other period in history that war has not functioned well in the twentieth century." This is supplemented by the conclusion: "In the most recent state of world-civilization war has made for instability, for disintegration, for depotism, and for unadaptability, rendering the course of civilization less predictable and continued progress toward achievement of its values less probable."

When we come to the legal aspect and the development of international law and the author is on his own heath, he propounds many acute aphorisms, e.g., "International law will fail in its purpose if it becomes merely a description of the behavior of states and also if it becomes merely an ideal system without influence upon that behavior." He points also to the increased threat of world wars due to three new religions, communism, state idolatry, and master race: "Because of the multiplicity of gods in this new pantheon, the cult of efficiency has made wars more certain and more formidable."

The second volume and third part of the Study examines particularly the relation of governments in modern times in the struggle for power, the connection of violent policy and armaments, the breakdown of neutrality, the limitations and weakness of international law, the growth of nationalism and its aggravation of strife. It may seem a strange comment that the treatment of some of these topics might have been a little more ample, particularly the section on international procedure. We have only a few general remarks on the International Prize Court or the International Court for Trying War Criminals, and no discussion of the problems connected with these proposals. One noteworthy remark, indeed, is made in connection with the failure of the democratic states in the period between the two world wars to check the aggression of the totalitarian states: "A world criminal code should condemn acts of criminal negligence as well as of criminal aggression." And he passes a sharp judgment on the democracies for their appeasement policies, particularly on his own state: "By insisting on isolation, democracies have in fact denied their principles, prevented the penetration of democracy into world-policies, and perpetuated the balance of power to the advantage of despotism. Democracies, therefore, while theoretically against war, have failed to proceed rationally to preserve peace and have blundered into war."

When our author comes to the final part of his Study, the prevention or control of war, he is under the disadvantage of writing before the United Nations in World War II had concerted their plans for the new order. Part of what he has to say, then, already seems obsolete, or at least obsolescent. He remarks shrewdly about the organization of the world-community: "The opportunity may be presented after World War II to make another long stride in advance. The appropriate form of action and the appropriate moment to act, however, cannot be predicted long in advance." He has for the main part confined himself to generalities as to the establishment of instruments for maintaining peace. And it indicates the revolution in ideas which the forcible teaching of war has already impressed, that he remarks about an international force: "The effective military action of states will continue to be confined to limited regions outside their frontiers. Land armies will continue to be difficult to transport to distant areas. It is likely, however, that effective military action of most states will for a long time be confined to limited geographical regions." After the exploits of the Allies both in the Solomon Islands and in North Africa, that judgment sounds out of date.

He is on surer ground when he points to the failure of the individual citizen of the world-community: "The world was a unit in that events in every part of it affected each individual in it, but social, economic, and political thinking and institutions regarded the individual not as a member of the world-community, but only of his own country." His final corollary about world government is: "Responsibility without power is as dangerous as power without responsibility. The League suffered from one and the nations from the other. A world-structure must be created in which power and responsibility go hand in hand."

It has been thought best to let the author of this immense Study speak for himself. It is not possible even in an extended review to reveal the wealth of learning and literature which is piled up; but anybody who wants to work a mine of social thought to-day will find in the two volumes a mass of rich ore and some nuggets.

NOTES ON IMPERIAL CONSTITUTIONAL LAW

[Contributed by PROFESSOR A. BERRIEDALE KEITH]

Privileged Will of a Territorial Officer.—An officer in the Territorial Army was on August 25th, 1939, summoned to rejoin his battery. Before doing so he wrote out a will which was witnessed only by his sister. The Territorial Army was embodied on September 1, and mobilized with the Regular Army on September 2, one day before war was declared against Germany. After serving for some time in England the officer went with his battery to France, and was killed in action. It was held that the testator was ordered on August 25, 1939, to take up duties which constituted him, when performing such duties, a soldier in actual military service within the meaning of s. 11 of the Wills Act, and that his will therefore was a privileged will, although it was actually made before the Territorial Army was formally embodied and he was not therefore on active service within the meaning of s. 189 (1) of the Army Act.¹ Pilcher J., however, held that the state of affairs on August 25, 1939, was extremely critical, and that when he was ordered to rejoin his battery immediately he was in actual military service. He referred to the case of *Limond v. Cunliffe*² as authority that the will might be privileged though no state of war existed, which proved that the proposition laid down by Jeune J., that a state of war existed with which the soldier is or may be connected, had in mind the facts of the case which he was considering. A liberal interpretation had also been given to the circumstances in which sailors were entitled to make privileged wills as in *the Estate of Ada Stanley*³ in which the Irish case of *In the Goods of Hale*⁴ was quoted with approval.

The Position under Regulation 18 B.—In *Budd v. Anderson and Others*⁵ Asquith J. declined to grant the application of Captain Budd for damages in respect of an error made in the Home Office by his being left in doubt as to the precise terms of his detention, with the result that he was deprived of his right under sub-clause (4) of regulation 18 B. of the Defence (General) Regulations, 1939, of making representations to the Secretary of State regarding his detention at the earliest possible moment. Asquith J. decided that the decision of a Divisional Court ordering the release of Captain Budd on the ground of the failure to carry out sub-clause (4) was unjustifiable, and that the combined effect of *Liversidge v. Anderson*⁶ and *Greene v. The Secretary of State for Home Affairs*⁷ was inconsistent with the earlier decision of the Divisional Court, overrode the

¹ *In the Estate of Rippon*, 59 T.L.R. 285.

² [1915] 2 Ch. 240.

³ [1916] P. 192.

⁴ [1915] I.R. 362.

⁵ 59 T.L.R. 341.

⁶ [1942] A.C. 206.

⁷ [1942] A.C. 284.

principle on which that decision proceeded, and compelled him to decide the present case in favour of the defendants. The plaintiff had suffered no injury.

German Vessel under Civil Arrest at Outbreak of War Liable to Condemnation.—In *The Pomona*⁸ Lord Merriman P. ruled that the Hague Convention 6 of 1907 was denounced by the British Government in 1925, and did not confer any rights on a German ship which at the beginning of the war was lying in the West India docks under arrest in an action in rem at the instance of the charterers for breach of the charter party. It was argued, however, that the terms of the Hague Convention were merely declaratory of principles of international law already recognized before the last war, but in vain.

Notice of Meeting of Company not to be sent to Shareholders in Enemy and Enemy-Occupied Territories.—In *re Anglo-International Bank Ltd.*⁹ the Court of Appeal ruled that the prohibition imposed by s. 1 (2) of the Trading with the Enemy Act, 1939, and the Defence (Trading with the Enemy) Regulations, 1940, which forbade the company from attempting to have any communication with any of its shareholders whose addresses were in enemy or in enemy-occupied territories, so that it would be an offence merely to post the notices addressed to them, was equivalent to suspending their right to receive notices. Accordingly it was legitimate for the appellant company to pass a special resolution for a reduction of capital in excess of its working requirements, for during the period of suspension they were in no better position than they would have been if under the company's articles of association they were given no right to receive notice. On the question of common law the position of shareholders depended on the question of the character of the occupation, and in the case of Monaco that might be dubious, but on the question of Trading with the Enemy Act, 1939, there could be no doubt.

The Status of a National Resident on Enemy-Occupied Territory.—In this case the House of Lords, reversing the Court of Appeal, decided that where an enemy has occupied territory outside his own boundaries the question whether that area has acquired "enemy character" depends on the purpose and intention of the occupation and the degree of dominion exercised. This was decided in *v/o Soufraht v. Gebr Van Udens Scheepvaart en Agentuur Maatschappij*,¹⁰ which was the appeal of the charterers, a Russian company. The Court of Appeal held that the company was eligible to be a suitor on the ground that the respondents were not in the position of alien enemies at common law and thus still enjoyed the right to resort to the King's Courts. It was, however, pointed out by the Lord Chancellor that the test of "enemy character" was fundamentally the same, so far as areas occupied by an enemy power are concerned, whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law. The test was an objective test; it was not a question of nationality or of patriotic sentiment. It depended on the character of the occupation and on the facts of each case. If as a result of the occupation the enemy was provisionally in effective control of an area and was exercising some kind of government over it, the area acquires "enemy character"; local residents cannot sue in our courts, and goods shipped from such an area have enemy origin; see Chief Justice Marshall's decision in the *Thirty Hogsheads of Sugar case*.¹¹ The common disability to sue in such cases could not be regarded as got rid of because emergency regulations would prevent the transmission abroad of the sum recovered. The asset would be created and might operate as security for an advantage to the enemy from a neutral lender. The operation of the rule refusing *persona standi in judicio* was always subject to permission being given by royal licence, but in the present case no application

⁸ 59 T.L.R. 111.

⁹ 59 T.L.R. 315.

¹⁰ 59 T.L.R. 101.

¹¹ *Bentzen v. Boyle* (1815), 9 Cranch, 191, at p. 195.

had been made, and the principles of *Porter v. Freudenburg*¹² applied. Lords Atkin, Tankerton, Wright and Porter also delivered judgments agreeing that the appeal should be allowed.

The Liability of the Minister of Supply to Suit.—The Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939, apply to the Minister of Supply the provisions of the War Department Stores Act, 1867, by s. 20 of which the Minister may institute and prosecute any action concerning stores contracted to be delivered to him, and may defend any action concerning any such stores. The Minister of Supply claimed damages against the defendants for an alleged breach of a contract of purchase which he had made with them, and the defendants counterclaimed for damages for an alleged breach of the contract by the Minister.¹³ He thereupon took out a summons for an order that the counterclaim disclosed no cause of action, but that as he had made the contract as a Minister of the Crown he could not be sued by a subject, and that the only right of the subject who felt aggrieved was to proceed by way of petition of right. Mackinnon L.J. ruled that the decision of the Lord Chief Justice, who allowed the counterclaim, was correct, and that the appeal failed. He held this supported by *Williams v. Lords Commissioners of the Admiralty*,¹⁴ which rested on a statute (1 & 2 Geo. IV, c. 93, s. 9) under which the Commissioners might bring any action of a particular kind and might defend any action of the like sort. The full Court of Common Pleas refused to make any order on a rule nisi to show why the plaintiff's action should not be set aside for irregularity. In *Hosier Bros v. Earl of Derby*¹⁵ the Court of Appeal stayed the action. It was suggested that suit might have been properly brought on the War Department's Stores Act, 1867, and permission was asked to amend by framing the action thereunder. The Master of the Rolls refused the application to amend, and expressed no opinion as to the result if the claim had been made under the statute. In *The Admiralty v. Baird*¹⁶ a counterclaim was stayed, Bankes L.J. saying that there was no suggestion in the statute that anybody had any right to bring any action or counterclaim against the Commissioners. The case of *Williams v. Lords Commissioners of the Admiralty* was not referred to in the case. The case of *Rowland v. Air Council*¹⁷ did not decide the point. The effective reason was that no evidence was brought to show that there were any liabilities of the Air Board to be transferred to the Air Council, and a second appeal,¹⁸ which was with regard to the plaintiff's claim for an alleged breach of patent rights, fell on the ground of the provision in s. 29 of the Patents and Designs Act, 1907, which provides that in default of agreement the terms of use of a patent were to be settled by the Treasury. A third appeal¹⁹ was allowed on the ground that it was an action of tort, according to Banks and Atkin L.J.J. He held therefore that he was free to interpret the Statute of 1867 in its natural sense. Goddard L.J. agreed with the opinion of the Lord Chief Justice; he did not think that the claim of the Crown could be justified; when a Minister was declared able to sue and defend an action, that was equivalent to saying that he could sue or be sued. The Master of the Rolls concurred.

The Exemption of the Crown from Liability to Civil Servants.—In *Lucas v. Lucas*²⁰ an order had been obtained for judicial settlement by a wife against her husband, an Indian civil servant and she obtained under order 45, rule 1, of the rules of the Supreme Court a garnishee order nisi against the High Commissioner for India in respect of the husband's sterling overseas pay in order to obtain payment of alimony. The High Commissioner took exception to the

¹² [1915] 1 K.B. 857.

¹³ *Minister of Supply v. British Thomson-Houston Co.*, 59 T.L.R. 242.

¹⁴ (1851) 11 C.B. 420.

¹⁵ [1918] 2 K.B. 671.

¹⁶ (1921) 8 L.L.Rep. 69.

¹⁷ (1927) 43 T.L.R. 717.

¹⁸ (1927) 96 L.J.Ch. 470.

¹⁹ [1927] 2 K.B. 517.

²⁰ 59 T.L.R. 281.

order nisi and appeared by counsel to show cause why the order should not be made absolute. Pilcher J. held that the husband, like other servants of the Crown, held office during the King's pleasure, and that there was no contract of service which he could enforce at law against the Crown or its appropriate officer. Therefore the husband's pay which the wife sought to garnishee could never be a debt owing or accruing from the Crown, and therefore could not be attached by the wife under the machinery provided by order 45, rule 1. It was already well established by the year 1822 in *Gidley v. Lord Palmerston*²¹ that actions by servants of the Crown would not lie against Ministers or officers of the Crown in respect of acts done in an official capacity. He agreed with the opinion of Lord Blackburn in *Mulvenna v. Lords Commissioners of the Admiralty*²² that public policy demanded certain conditions with regard to servants of the Crown, both military and civil, as had been laid down in *Leman v. Rex*²³; and *Smith v. Lord Advocate*²⁴. In every contract between the Crown and a public servant there must be read the implied condition that they have no right to their remuneration which could be enforced in a civil court, and that their only remedy under their contract lay in an appeal of an official or political kind.

Trading with the Enemy.—In *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*²⁵ a contract had been entered into between a Swedish bank and a German company as principals and an English company as surety, under which the Swedish bank sold to the German company a large sum in reichsmarks at a price in sterling to be paid after an interval of eight years. The English company, a subsidiary of the German company, guaranteed the performance of the contract by the German company, and in 1936 a further contract was entered into under which the English company contracted with the Swedish bank to purchase at a discount their claim against the German company by instalments paid over the eight years. On payment of all instalments the German debt would be extinguished. Instalments were regularly paid until the outbreak of war, and in October, 1939, no instalment being paid, the Swedish bank sued for it, and the action was dismissed on the ground that the payment of the instalment would have been an offence under the Trading with the Enemy Act, 1939. The English company now brought an action against the Swedish bank claiming that the contract between them had been (1) abrogated and made illegal by the war, and (2) frustrated as being impossible of performance during the war. It was held by Simonds J. that the contract, though between an English company and a neutral, was for the benefit of the enemy, and that its performance necessarily involved commercial intercourse and dealings with the enemy. Therefore, although partly performed, it was dissolved and abrogated, and not merely suspended by the outbreak of war with Germany. He cited the views of Lord Dunedin in *Ertel Bieber and Co. v. Rio Tinto Co.*,²⁶ in which he pointed out that the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country, which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law. He also cited a passage from the judgment of Russell J. in *In re Badische Co.*,²⁷ which dealt with the case of a contract between British subjects, but of such a nature that either its further performance involved intercourse with the enemy, or its continued existence would confer upon the enemy an immediate or future benefit. He

²¹ (1822) 3 Brod. and Bing. 275.

²² [1926] S.C. 842.

²³ [1920] 3 K.B. 633.

²⁴ (1897) 25 R. 112.

²⁵ 59 T.L.R. 208.

²⁶ [1918] A.C. 260, at p. 274.

²⁷ [1921] 2 Ch. 331, at p. 373.

could see no reason why a contract of such a nature should not become void on the outbreak of war, irrespective of any question whether the parties thereto are enemies or friends. Nor could it be argued, though the performance of the contract might be prohibited during the war, yet the contract might remain in existence, its performance being deferred until after the end of the war. That was a principle long ago rejected in *Esposito v. Bowden*.²⁸ It might be there was a class of contract the performance of which was suspended and not abrogated by the outbreak of war, but the only example he could think of was where the contractual right was a concomitant of a proprietary right, as for example a covenant to pay rent might be a concomitant of a leasehold interest, or unless the right were an accrued right at the outbreak of war in the sense of a right accrued by reason of a breach of contract. He held it unnecessary to determine the second question raised by the plaintiffs—namely, whether, assuming that the contract was not abrogated by the outbreak of war, it was frustrated by the fact that during the war—that is, for a period of indefinite and unpredictable duration—its performance was rendered impossible. The questions were not easy to answer, partly because they were based on an assumption which in his judgment the law did not admit, that the contract was not abrogated but only suspended in its operation.

Dispensing with Service of Divorce Proceedings.—In *Luccioni v. Luccioni*²⁹ the Court of Appeal dismissed an appeal from the President from an order refusing Mrs. Ada Luccioni's application under s. 42 of the Matrimonial Causes Act, 1857, for leave to dispense with the service on her husband of a petition for divorce on the ground of desertion. The husband was a French national and his domicile of origin was France. He had deserted his wife in October, 1936, when he went to Paris; she had had no news of him, and as late as March, 1942, she was informed through the Red Cross that no news concerning him had been received. Lord Merriman held that where a petition involved a change of status, and where substituted service was impossible, the Court before dispensing with service should require to be satisfied that the respondent spouse had become aware of the fact that the petition was being prosecuted, or, at the very least, of the intention to prosecute it, and in either case had had time and opportunity to indicate whether it was to be defended. Scott L.J. pointed out that the petition might have been presented in October, 1939, and that between then and the occupation of France in June, 1940, substituted service could have been effected had the petition then been presented. In the exercise of his discretion the President had refused to give leave to dispense with service, but he had made a statement which Mr. Beyfus submitted was erroneous in law, as imposing on himself a fetter in the exercise of the discretion which s. 42 had not imposed. The President, however, was not for one moment intending to impose limitations on his discretion. He was only mentioning hypothetical events which were each of them within the category of relevant matters for consideration in connection with the exercise of the discretion. MacKinnon and du Parc L.JJ. agreed that the President's decision in this case was quite right, the latter adding a reference to Lord Wright's speech in *Evans v. Barilam*,³⁰ in which he emphasized the importance of laying down no rules which would fetter the discretion to be exercised by the Court, but added: "It is, however, often convenient in practice to lay down, not rules of law, but some general indications to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another."

The Invalidity of the Debt Adjustment Act, 1937, of the Province of Alberta.—The Privy Council³¹ agreed with the decision of the Supreme Court of Canada³² determining the constitutional invalidity of the Debt Adjustment Act,

²⁸ 7 Ell. and Bl. 763.

²⁹ 59 T.L.R. 202.

³⁰ [1937] A.C. 473, at p. 488.

³¹ *A. G. of Alberta v. A. G. of Canada*, 59 T.L.R. 160.

³² [1942] S.C.R. 31.

1937, as amended five times since. They recognized that the situation in Alberta demanded strong measures, but they considered that the only question which was open to them was not the wisdom of the measure, but the power of the province to pass it. The contention on behalf of the appellant was that the Act fell under s. 92 of the British North America Act, (13) property and civil rights, (14) the administration of justice, and (16) generally all matters of a merely local or private nature. The Act provided that without the assent of the Debt Adjustment Board action against resident debtors in respect of debts created before July 1, 1936, should not be initiated or continued without a permit on behalf of the Board. It was also empowered on request to bring about agreements between resident debtors and their creditors with the object of reducing debts so as to bear some relation to the debtors' ability to pay. Further, a resident farmer, who was in default on a proposal confirmed under the Dominion Act, the Farmers' Creditors Arrangement Act, 1934, could not be proceeded against by the creditor without a permit from the Board. It was contended against the Act that it was legislation within the meaning of bankruptcy and insolvency, reserved to the Dominion by s. 91 (21) of the British North America Act, 1867. In the opinion of their Lordships the provincial Act was legislation in relation to insolvency. As regards debts payable in the province the creditor was deprived of his right to present a bankruptcy petition under the Dominion Bankruptcy Act. On this ground they held the Act invalid, and refrained from expressing their opinion on the other important matters discussed by the Supreme Court. The appellant's claim was not helped by s. 39 of the Act, which provided that the provisions of the Act should not be so construed as to authorize the doing of anything not within the power of the legislature. If apart from s. 39 the Act was ultra vires it must be construed and treated as such.

The Invalidity of Dominion Taxation of Insurance Policies.—S. 16 of the Special War Revenue Act provided a tax of 10 per cent. on any person insuring his property with any British or foreign company or with any foreign exchange, not authorized under the laws of the Dominion to transact the business of insurance. It was held³³ that the section was ultra vires. It was so related to the insurance legislation affecting British and foreign companies and extra Canadian exchanges that, such insurance legislation being invalid, the section must fall with it. Assuming that the Dominion, in exercise of the control of trade and commerce under s. 91 (2) of the British North America Act, might regulate the business of insurance carried on by British companies as a branch of external trade and commerce, this did not give the Dominion authority to regulate their strictly provincial business, and s. 116, 117, 118 of the Canadian and British Insurance Companies Act, 1932, did affect the regulation of such business. The principle of exclusive provincial control of the business of insurance within the province lies at the foundation of the judgment of the Privy Council in *re The Insurance Act of Canada*.³⁴ The corresponding enactments in the Foreign Insurance Companies Act, 1932, amended in 1934, being also legislation in relation to the business of insurance within the province, were not intra vires; and the case of extra Canadian exchanges was not distinguishable.

The Validity of the Income Tax Act of Alberta.—The Income Tax Act, 1932, of Alberta was held by the Supreme Court to be valid. It was not a tax on the income itself, but was a tax on the person receiving the income who was found within the province, including that derived from sources outside the province.³⁵

The Power of the Governor in Council to Make Orders under the War Measures Act, 1941.—In *Dallman v. The King*³⁶ the Supreme Court upheld the validity of the conviction of the appellant: He contended that the whole of the

³³ [1942] S.C.R. 429.

³⁴ [1942] A.C. 41.

³⁵ *Kerr v. Superintendent of Income Tax*, [1942] S.C.R. 435.

³⁶ [1942] S.C.R. 339.

Order in Council was ultra vires because it gave power to the foreign exchange control board to pass regulations that only the Governor in Council was authorized to promulgate under the provisions of the War Measures Act, and must fail. The Board had not passed any regulations affecting the appellant; what he had done was to contravene sub-s. 1 of par. 22 of the order, which had the same force as if it had been enacted by Parliament. S. 4 of the Act permitted the Governor in Council to prosecute either on summary conviction or on indictment, and the accused was not the only person entitled to exercise the option as to the mode of trial.

The Extent of Claims against the Crown.—In *The King v. Paradis and Farley Inc.*³⁷ the Supreme Court, reversing the judgment of the Exchequer Court of Canada that in view of the terms of the contract which was the law of the parties, and by which the Court was bound, the respondent's petition of right should be dismissed. He had undertaken to do a piece of work, the driving of piles in a specified place, not in a specified soil; he had the legal obligation to execute the contract for the price agreed upon, just as he would have had undisputable right to benefit had the soil been more favourable and easier than was foreseen. It was held further that the contentions of the Crown could also be justified by statutory law, because the Exchequer Court had exclusive original jurisdiction in all suits in which the case rested on a contract, and s. 48 of the Exchequer Court Act limited the jurisdiction of the Court; and further, assuming that the claim of the respondent was not covered by the contract, it would still fail because the agreement itself contained a clear declaration that no implied contract should arise from anything in this contract.

Electoral Law in Canada.—In *Sideleau v. Davidson*³⁸ the respondent, who had been elected a member of the House of Commons for the county of Stanstead, was declared to have forfeited his seat because of the corrupt and illegal practices, consisting particularly in the distribution of whisky and money by the Liberal Organization of the County. The joint-president of the Organization received from the other joint-president a sum of 1,200 dollars, which in part served to purchase whisky, and the balance was distributed to local organizers in the surrounding municipalities. Many persons treated electors, and on a smaller scale some voters received money for their votes, and others were the recipients of unexpected gifts, which were termed as having been made for charitable purposes. It was held that all the acts established amounted to corrupt practices, and they were sufficient to void the election, although the respondent himself and his official agent had not been parties to them. When s. 49 of the Dominion Controverted Election Act provided that any corrupt practice permitted by a candidate or by his agents rendered the election void, the word "agent" covered any unofficial agent. The distribution of money to local organizers, who were not asked to give any account of their disbursements, allowed a Court to draw the inference that it was intended for the corruption of the electors, as held in *Belleau v. Dussault*,³⁹ and *Gallery v. Darlington*.⁴⁰ There must, of course, be proof of a linking of the so-called agent with the candidate; but it was not necessary there should be a mandate by the candidate to one of his supporters in order that the latter be termed an agent, as held in *Brassard v. Langevin*.⁴¹ When a candidate and his official agent relied upon a political organization, the accredited members of the association should be held to be the agents of the candidate. Nor had the candidate fulfilled the obligations incumbent upon him to be relieved of the consequences of corrupt practices by the operation of s. 54 of the Dominion Controverted Elections Act, for nothing in the record could lead the Court to the conclusion that all reasonable means had been taken to prevent corrupt practices.

³⁷ [1942] S.C.R. 10.

³⁸ [1942] S.C.R. 118.

³⁹ (1885) 11 Can. S.R. 133.

⁴⁰ (1906) 37 Can. S.C.R. 563.

⁴¹ (1877) 1 Can. S.C.R. 143.

Regulations as to Chemicals by the Governor in Council.—The Supreme Court decided that the Governor in Council had power under the War Measures Act to delegate to subordinate authority his powers, whether legislative or administrative, authorizing them to make orders generally of the nature of those which the Controller of Chemicals was empowered to make by regulations.⁴² This followed by the decision in *Re Gray*⁴³ and the *Fort Frances* case,⁴⁴ which showed that a legislative enactment deemed necessary and advisable by reason of war should have the effect of an Act of Parliament; it was also held that the Governor in Council could delegate his powers to subordinate agencies. But under the War Measures Act the final responsibility for the acts of the executive rested upon Parliament, which had not abrogated its general powers, nor abandoned its control.

The Liability of the Crown for the Actions of Members of the Active Militia.—In the case of *Matthew McArthur v. The King*⁴⁵ a petition of right was brought claiming damages from the Crown for personal injuries due to negligence on the part of Private MacDonald, who was engaged in transporting soldiers' mail. Thorson J. held that the term "officer or servant of the Crown" used in s. 19 (c) of the Exchequer Court Act should be regarded as meaning servants of the Government, whether appointed by it for the performance of certain duties, or hired by it for certain tasks of employment, all with a view to the accomplishment of Governmental purposes. S. 19 (c) of the Exchequer Court Act as amended in 1938 made the doctrine of employer's liability fully applicable to the Crown in respect of the tort of negligence, but the doctrine did not extend to persons on active military service. Such a person was performing a national function of citizenship that was in no way related to governmental service or employment; his legal status was that of a person under a written personal engagement with the King, whereby he rendered his services as a soldier in the defence of his country pursuant to his duty of allegiance to the King. No case was cited in which a person who enlisted in an active unit of the Canadian Army had been held to be an officer or servant of the Crown within the meaning of the Exchequer Court Act. In *Moscovitz's case*⁴⁶ the Supreme Court had held that Private Kelly's duties were not employment on a public work, and no inference could safely be drawn that the Court concurred with the view⁴⁷ that Private Kelly was an officer or servant of the Crown within the meaning of the Exchequer Court Act. In the *Yukon Southern Air Transport Ltd.*⁴⁸ the opinion of Angers J. held that the officers of the Royal Canadian Air Force, both members of the Permanent Force, were officers or servants of the Crown, but Private MacDonald was a member of the non-permanent Active Militia, and so fell within the words of Taschereau J.,⁴⁹ speaking for the Supreme Court: "Then I do not see that the words 'any officer or servant of the Crown' can be held to include the officers or men of the Militia." There was no English decision which could be regarded as in point, for under the law obtaining in England a petition of right would not be permitted, but his opinion was supported by the decision of the New York Court of Appeals in *Goldstein v. State of New York*.⁵⁰ The New York Court of Appeals reversed the decision below which affirmed a judgment of the Court of Claims in favour of the claimants for damages arising from the death of their son while serving in the State Militia, through negligence of other members of the Militia. The decision is the more remarkable because the State⁵¹ had waived all immunity from liability

⁴² [1943] S.C.R. 1.

⁴³ [1918] 57 Can. S.C.R. 150.

⁴⁴ [1923] A.C. 695.

⁴⁵ [1943] Ex. C.R. 77.

⁴⁶ [1943] Ex. C.R. 188; [1935] S.C.R. 404.

⁴⁷ See [1943] Ex. C.R., at pp. 127, 128.

⁴⁸ [1942] Ex. C.R. 181.

⁴⁹ (1900) 6 Ex. C.R. 425; (1901) 31 Can. S.C.R. 206, at p. 209.

⁵⁰ (1939) 281 N.Y. 396.

⁵¹ Court of Claims' Act. s. 12a.

for the torts of its officers and employees, and the decision of the New York Court of Appeals rested on the view that neither the officers nor the private soldiers of the State Militia were employees of the State. Neither officers nor private members were acting in the employment of the State. They were citizens performing a public duty under the military law. He accordingly dismissed the case, but in accordance with the novelty of the issue without costs.

Delegated Legislation on Defence.—In *Wishart v. Fraser and Others*⁵² the High Court held that a solicitor, who was charged with speaking to cause disaffection among members of the Second Imperial Australian Forces, was liable to punishment under the National Security Defence Act, 1939-40. The only point of importance which was raised was that s. 5 of the National Security Act, 1939-40, was invalid on the ground that it purported to delegate the whole power to make laws with respect to the naval and military defence of the Commonwealth, and was therefore invalid. The answer to this contention was that a similar question had been decided in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan*,⁵³ and that the decision had been given in favour of the delegation. Nothing else remained in the case necessitating any doubt as to the validity of the decision of the Court of Petty Sessions of New South Wales.

Endeavour to Influence Public Opinion in a Manner likely to Prejudice the Efficient Prosecution of the War.—In *Francis v. Rowan*⁵⁴ it was decided that to establish a charge of endeavouring orally to influence public opinion in a manner likely to be prejudicial to the efficient conduct of the war, contrary to the provisions of reg. 42 of the National Security (General) Regulations, it was sufficient to show that the person charged consciously made a public speech which was likely to be prejudicial to the efficient prosecution of the war, and it was immaterial that in making this speech he did not intend to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war.

Form of Oath on Enlistment for Military Service.—In *Skitch v. Pratt*⁵⁵ the question was raised of the form of oath which was required of a person liable to serve compulsorily in the citizen forces under Part 4 of the Defence Act, 1903-39. No form was provided in the Act itself, or in the regulations, and exception was taken to the form of oath imposed, which followed the terms of the oath set out in the third schedule to the Act, except that the forces mentioned were described as "military" forces and the words "for the term of years" were altered to "until the cessation of the present time of war." On the person refusing to take the oath as tendered, he was charged under s. 76 of the Act for refusing to do so, and was convicted. It was ruled by Rich J. that the alterations made in the form of oath were quite legitimate, though the sentence imposed on the defendant was altered from six weeks' imprisonment to a fine of £1. Starke J. agreed, but McTiernan J. held that there was room for grave doubt as to the propriety of the oath.

The Power of Making Regulations.—In *Andrews v. Howell*⁵⁶ the High Court ruled that the National Security (Apple and Pear Acquisition) Regulations are a valid exercise of the power to make regulations conferred by s. 5 (1) of the National Security Act, 1939-40, and are within the ambit of the defence powers of the Commonwealth. This judgment was agreed to by Rich A.C.J., Dixon and McTiernan JJ., but Starke J. dissented. All the justices, however, agreed that the regulations did not contravene s. 92 of the Constitution, and that in relation to s. 51 (xxx) of the Constitution they did not provide for the acquisition of property otherwise than on just terms. In *The Australian*

⁵² 64 C.L.R. 470.

⁵³ (1931) 46 C.L.R. 73.

⁵⁴ 64 C.L.R. 196.

⁵⁵ 64 C.L.R. 191.

⁵⁶ 65 C.L.R. 255.

*Pear and Apple Marketing Board and Another v. Tonking*⁵⁷ the Court further decided that the provision for compensation contained in reg. 17 of the National Security (Apple and Pear Acquisition) Regulations does not provide the only means by which a grower may obtain compensation; if it were the only provision for compensation, then the terms of acquisition would not be just, and the Regulations would be beyond the powers of the Commonwealth under s. 51 (xxxi) of the Constitution. Persons having rights and interests in apples and pears acquired by the Commonwealth may enforce in the ordinary way by action in the Courts the claims into which by Regulation 12 their rights and interests are converted. This was held by Latham C.J. and Rich J., but McTiernan J. disagreed, holding that action should have been taken under reg. 17.

The Advantages of following Decisions of the Court of Appeal.—In *Waghorn v. Waghorn*⁵⁸ the question arose of the advantage of following the judgment of the Court of Appeal in *Earnshaw v. Earnshaw*,⁵⁹ affirming the judgment in *Herod v. Herod*,⁶⁰ on the subject of the position of a deserted party on the ground of divorce. The Supreme Court of New South Wales in accordance with the decision of the High Court in *Crown Solicitor (S.A.) v. Gilbert*⁶¹, which was binding on the Supreme Court, decided against the petitioner, who claimed for desertion by his wife, but at the same time admitted that he had himself committed adultery. The High Court had held that as a matter of law the desertion was naturally terminated. The High Court now held that the doctrine laid down in *Crown Solicitor (S.A.) v. Gilbert* should not be followed on the ground that it was desirable to obtain agreement with the doctrine of English law. Dixon J. held that if a view of the law was taken in England from which there was unlikely to be any departure, wisdom was on the side of the courts applying that view to Australian conditions, notwithstanding that the court had already decided the question in the opposite sense. The fact that they still believed in the correctness of their own decision, as he did in the present case, was not in itself adequate ground for refusing to follow this course. The common law was administered in many jurisdictions, and unless each of them guarded against needless divergencies of decision its uniform development was impaired. Statutes based upon a common policy and expressed in the same or similar forms ought not to be given different operations. But the court had taken some trouble to preserve consistency of decision not only with English courts, but also with those of Canada and New Zealand. In England the judgment of the Court of Appeal was such as to make short work of the question, and to make it probable that in England the matter would be treated as closed. Rich J. held that in accordance with the desirability of following the views of the Court of Appeal that, if a spouse committed adultery after he or she had been deserted, the desertion is not necessarily terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct. If it was left in doubt whether the respondent knew of the adultery, or if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. Williams J. held that in the interest of uniformity the English law should be accepted. McTiernan J. was not convinced that any error had been committed in *Crown Solicitor (S.A.) v. Gilbert*, and he did not think it proper to depart from that decision on the ground that it was desirable to have a measure of uniformity in the interpretation of the Matrimonial Causes Act of New South Wales and the English Act. Starke J. agreed in refusing to follow *Crown Solicitor (S.A.) v. Gilbert*, which was an erroneous decision and should no longer be followed.

⁵⁷ 66 C.L.R. 77.

⁵⁸ 65 C.L.R. 289.

⁵⁹ [1939] 2 A.E.R. 698.

⁶⁰ [1939] P. 11.

⁶¹ (1937) 59 C.L.R. 322.

The Validity of Delegated Legislation.—By a majority of three to two⁶² the High Court had held to be invalid regulations issued under the National Security Act providing that any body, the existence of which the Governor-General declares to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, is unlawful. The judgment was given in a case in which a sect called Jehovah's Witnesses, the members of which refused to swear allegiance to the King, and which was declared to be unlawful under the regulations, claimed damages from the Crown for unlawful occupation of its premises at Adelaide. The majority of the court (Rich, Starke, and Williams JJ.) held the regulations invalid. Starke J. pointed out that the regulations, which were arbitrary, capricious, and oppressive, prohibited all the doctrines of the declared body, religious, political, economic, or social, innocent or injurious. A mere declaration of the executive sufficed to put out of existence and divest of their rights and property bodies which were suspect. Regulations such as these authorizing the forfeiture of property had little real connections with the Commonwealth's defence powers, and even if enacted by Parliament they would transcend the powers conferred by the Constitution. Rich and Williams JJ. agreed that the regulations were so far-reaching that they were not reasonably required to prevent the dissemination of prejudicial doctrines. Latham C.J. and McTiernan J. held that the regulation under which Jehovah's Witnesses were dissolved was within the defence powers of the Commonwealth. But they ruled that the regulation preventing the dissemination of unlawful doctrines was invalid to the extent that it prevented the advocacy of innocent or meritorious doctrines, and that the regulation authorizing the Commonwealth to occupy an unlawful association's premises was invalid, as it had no relation to the actual and probable user of the premises. It will be seen, therefore, that, although the court was divided on the issue whether Jehovah's Witnesses could properly be dissolved, there was unanimity on the question whether the buildings could properly be seized by the Commonwealth.

The Rights of Civil Servants transferred by the State to the Commonwealth.—In *Cosway v. The Commonwealth*⁶³ the plaintiff brought an action to enforce the rights which he claimed to have under s. 84 of the Constitution, s. 60 of the Commonwealth Public Service Act, 1902-18, and s. 45 of the Commonwealth Public Service Act, 1922-1939 respectively, and under a condition which he alleged existed in the agreement whereby the Commonwealth acquired the Williamstown dockyard from the State of Victoria. The substance of his complaint was, that he had received in the Commonwealth service a reduction of salary below what he was receiving as an officer of the Ship Construction Branch, and he was reduced in rank from blacksmith foreman to blacksmith. He contended that, under the Public Service Act of Victoria in force at the time of his appointment to the Commonwealth Public Service, he would have been entitled to receive in any department of the State Public Service a salary not less than that which he received in the department from which he was transferred, and to retain rank not less than that of blacksmith foreman in whatever department he was employed. McTiernan J. investigated the question of the right of the plaintiff to sue. He held, however, that s. 84 of the Constitution had no application to his case; Williamstown dockyard was not a department which was transferred to the Commonwealth, but as laid down in *The King v. Brislan; ex parte Williams*⁶⁴, an aggregation of State property which passed to the Commonwealth by purchase. The Commonwealth and State Governments rightly took the view that action other than the purchase of the property was necessary to place in the Public Service of the Commonwealth the members of the staff whom the Commonwealth required. Further, as the plaintiff was not in the service of the State of Victoria at the establishment of the Commonwealth, he was not eligible for transfer

⁶² *The Times*, June 16, 1943.

⁶³ 65 C.L.R. 628.

⁶⁴ (1935) 54 C.L.R. 262, at p. 274.

to the Commonwealth under the provisions of s. 84 relating to the rights of officers transferred individually to the Commonwealth. For these reasons s. 84 did not apply to the case. S. 60 of the Commonwealth Public Service Act, 1902-18, contained provisions in form more general than the last paragraph of s. 84 of the Constitution. But the Act made no provision for effecting the transfer as such of an officer from the Public Service of a State to the Public Service of the Commonwealth. It authorized the appointment of a State servant under s. 34A (1), but such an appointment was not a transfer of the officer from the State to the Commonwealth. The plaintiff resigned from the Public Service of the State; his resignation was accepted by the State; thereupon he was appointed to the Public Service of the Commonwealth. Similarly s. 45 of the Commonwealth Public Service Act, 1922-39, did not apply, as the plaintiff was not transferred to the Commonwealth Public Service. Nor was there any evidence that the Commonwealth had departed from any representation made to the plaintiff by any person having any semblance of authority to bind it.

The Validity of the Emergency Powers Acts of Eire.—In *The State (Walsh and Others) v. Lennon and Others*⁶⁵ the Supreme Court of Eire laid down that an application for an order of habeas corpus could be entertained by the High Court and on appeal by the Supreme Court, where it appeared that the applicant was detained pursuant to a law to which sub-s. 3 of Art. 28, s. 3 of the Constitution applied. That section provides that nothing in the Constitution should invalidate any law expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done in pursuance of any such law. By the Emergency Powers (No. 41 F) Order, 1941, four accused persons were ordered to be brought before a Military Court established by the Emergency Powers (No. 41 F) Order, 1940, to be tried on a charge of murder, these powers having been made under the Emergency Powers Act, 1939, and the Emergency Powers (Amendment) (No. 2) Act, 1940. The validity of Order No. 41 of 1940 and of the two Acts was established in *In re McGrath and Harte*,⁶⁶ but the validity of Order No. 41 F of 1941 was challenged on an application by the accused for orders of habeas corpus and prohibition. It was contended that the Order was *ultra vires* as it directed that the Military Court was to try the accused together, and so deprived it of exercising its discretion, and that all the accused had been brought before a Special Criminal Court and charged with the murder, and, after their trials had proceeded for some time, a *nolle prosequi* had been entered against each of them. The Supreme Court had held that the Order was within the powers conferred and could not be impugned; the argument based on the entering of a *nolle prosequi* being unsustainable, as in no case had it been decided that the entering of a *nolle prosequi* by the Attorney-General was a bar to another indictment for the same offence. The Emergency Powers (No. 139) Order, 1941, altered the laws of evidence as to the admission of statements, and allowed a Military Court, if it considered it proper, not to be bound by any rule of evidence, statutory or at common law. It could not be contended that the Order constituted such a fundamental change in the law of evidence as to deprive the Military Court of the attributes of a judicial tribunal, and to prevent the Court from carrying such a trial as was contemplated by s. 3 of the Act of 1940.

The Immunity of Ships from Jurisdiction.—In *Zarine v. Owners of S.S. "Ramava"* and *McEvoy v. Owners of S.S. "Otto"*,⁶⁷ the Supreme Court, on ascertaining from the Department of External Affairs that the Government of Eire did not recognize the U.S.S.R. as a sovereign independent State either *de jure* or *de facto* in Estonia or Latvia, held that the claim by the U.S.S.R. to ownership of the ships in question could not be recognized by the courts and the U.S.S.R. was not in any way affected by the proceedings. The appeals, therefore, must

⁶⁵ [1942] I.R. 112.

⁶⁶ [1941] I.R. 68.

⁶⁷ [1942] I.R. 182.

be dismissed and the orders of Hanna J. that the ships were never at any time in the physical possession of the Estonian and Latvian Governments or of the U.S.S.R., and they remained at all relevant times in the possession of the masters on behalf of their respective private owners must stand. While the vessels were at sea the U.S.S.R. invaded Estonia and Latvia; the Parliaments of those States passed declarations asking for their admission into the U.S.S.R., and the Supreme Soviet incorporated the States. Prior to the incorporation the Parliaments of Estonia and Latvia had passed decrees whereby all private property in the States was nationalized. The replies of the Government of Eire rendered impossible the discussion of their claim.

NOTES

Legislative Drafting in Canada. — The promotion of uniformity of legislation in Canada is happily stimulating the general improvement of drafting. If the Provinces of the Dominion are to be invited to adopt a proposed uniform statute, its favourable consideration must not be jeopardized by any defects of form.

The British Columbia commissioners made a notable contribution in 1919. Their report to the Conference in that year recorded the view that improvement of methods of legislative drafting and the training of men for the work of framing statutes had in no country received the attention which their importance deserved. It mentioned the comparatively recent progress made in England after the creation of the office of the Parliamentary Counsel in 1869, and it acknowledged the debt due to men like Lord Thring and Sir Courtenay Ilbert, who summarized their principles and their experiences for the practical guidance of later generations. It briefly referred to the appointment by the American Bar Association in 1913 of a special committee on legislative drafting and to the tentative sketches of a proposed manual which were published with the Association's annual reports in the next three years. In Canada, said the British Columbia commissioners, the English practice had been profitably followed, but there had still been all too little attention to the technique or mechanics of law-making. The 1919 report collated extracts from eminent authorities, freely drawing upon the works of Thring and Ilbert. A brief bibliography included also four American sources, George Coode's *Legislative Expression* (Philadelphia, 1848), Ashton Willard's *Legislative Handbook* (Boston, 1890), Chester Lloyd Jones' *Statute Law Making in the U.S.* (Boston Book Co., 1912), and *Statute Law-making in Iowa* (Iowa State Historical Society, 1916). The British Columbia experts naturally devoted space to the co-ordination of the Interpretation Acts of the several Provincial Legislatures, and dealt with such matters as marginal notes, the general arrangement of Acts, the numbering and length of sections, the formation of a legislative sentence, the use of words, the use of the present tense and the active rather than the passive mood, the control of the proviso (a primitive form of amendment by which the instructed eye is often offended), and the *ejusdem generis* rule which Sir John Salmond helped to abrogate in New Zealand in 1908.

At its Toronto meeting in 1941 the Canadian Conference appointed Mr. J. P. Runciman and Mr. E. H. Silk, legislative counsel respectively for Saskatchewan and Ontario, to revise the report of 1919. The 1942 pamphlet is the result.¹ Besides reprinting the observations and suggestions contained in the 1919 report, it reduces into 18 rules, occupying four short pages, the waywise advice extracted from the writers already named. It does not fail to mention the 1938 edition of Sir Alison Russell's *Legislative Drafting and Forms*; indeed it reproduces four of the flowers from Sir Alison's anthology of public comments on drafting and draftsmen.

Proposals for uniform laws, intended for prolonged scrutiny at leisure, will not always be prepared under the same principles and conditions as a Bill framed for a current session at Westminster. Nor, as we know, is Canadian drafting practice always identical with that of England (see *Review of Legislation*, 1940, p. 2, n. 3).

"Acts should be carefully punctuated," says one of the Canadian rules of 1942; "bracketing for punctuation should be avoided." In England the bench may regard commas and colons and brackets as "appendages which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an Act of Parliament" (Willes, J., in *Claydon v. Green*, L.R. 3, C.P. at p. 522). At any rate, English apprentices are disciplined to draft without punctuation. Another of the 1942 rules prescribes that "a short title section shall appear at the commencement of every draft uniform Act." In England—where, by the way, the word "commencement" would have a special significance—short titles have been postponed to the end of statutes except in the Army and Air Force (Annual) Act. Perhaps Canadian draftsmen do not need to be advised that short titles should be short; there are English instances which might justify the warning.

¹ A copy has been kindly supplied by the Secretary of the Commissioners, E. H. Silk, Esq., K.C., Parliament Buildings, Toronto.

These are trivial matters. A larger question emerges from a passage in the 1919 report which advocated verbal economies by means of eliminating from such contexts as "subject to the provisions of Part IV of *this Act*," or "in the First Schedule to *this Act*" the words we have italicized. A uniform clause, said the British Columbia commissioners, might provide that such references to a part or a section or a schedule of an Act should be deemed references to the Act in which they occur unless the contrary is indicated. The question is this—For whom is the statute drafted? Is it for the legislator, the judge or the man on the omnibus? If we assume that the draftsman has all three of them in mind, is the verbal saving worth the sacrifice of ease in reading? For many years the Finance Act annually enacted at Westminster has saved words by appending to its final section the following provision:—

"Any reference in this Act to any other enactment shall, except in so far as the context otherwise requires, be construed as a reference to that enactment as amended by or under any other enactment, including this Act."

The result has been known to puzzle lawyers as well as laymen. They have been referred perhaps to some subsection which has been replaced by an amending statute. Turning up the original subsection, they search in vain for the words which they see attributed to it. They have no clue to the intermediate amendment and they probably have not read the Finance Act through to the bitter end and discovered the key to the enigma. Such economies in words may be judge-proof. They may be unobjectionable in technical legislation like a Finance Act or in drafts of uniform laws which experts will scrutinize. They do not help the man on the omnibus. But then legislative phraseology and common speech are different languages.

C. T. C.

Malta's Constitutional Future. — The important announcement made by the Colonial Secretary in the House of Commons on July 7, 1943² that full responsible government in all internal matters will be restored to the Maltese people on the cessation of hostilities, is certain to receive the unanimous approval of all the political parties in the island. As the Colonial Secretary indicated in his announcement, the sphere of transferred and reserved subjects will follow the general lines adopted in The Malta Constitution Letters Patent, 1921³.

That Constitution had, in fact, established a diarchical form of government in Malta⁴. All matters of local and domestic concern were placed, in accordance with the ordinary principles of parliamentary practice, under the control and responsibility of the Maltese people. Matters touching, on the other hand, the general defence of the Empire, its foreign relations and the position of Malta as a strategic unit of vital importance in the Mediterranean, were reserved to the Imperial Government. The working of responsible government proved an outstanding success, and the Maltese Ministers were able to effect considerable improvements in the cultural, social and economic structure of Maltese life. Unfortunately, the Colonial Secretary found it expedient, twice during its comparatively brief existence (1921-1933), to suspend the full operation of the Constitution on the ground of "grave emergency,"⁵ and, in both instances, the constitutional crisis was obscured by incidents not directly relevant to the matters in dispute. Issues of much greater gravity have frequently occurred in this country and also in some of the Dominions, but without the necessity of throwing the whole constitutional machinery out of gear. The solution in such cases is sought in the remedies provided by parliamentary government itself, viz., the holding of new elections or the formation of an alternative government by the leader of the Opposition. In Malta, however, the two suspensions of the constitution were rendered possible by section 41 of the Letters Patent of 1921 which made the Colonial Secretary the sole authority to decide whether "the carrying on of responsible government was being prejudiced by reason of any grave emergency which has arisen and continues to exist within the island." There is no need to be drawn into the controversies about the motives which purported to justify the withholding of representative institutions in Malta at the time. But there are certain valuable lessons of experience worthy to be taken into account when the new Constitution is being drafted.

A second point which will also require careful consideration is the exercise of the Royal Prerogative of legislation in Malta. The matter was dealt with by section 68 of the Letters Patent of 1921, but it occasioned a good deal of judicial conflict which eventually led to the passing of The Malta (Letters Patent) Act by the Imperial Parliament in 1936. By section 1 of this Act, it was enacted that, notwithstanding any limitation imposed by section 68, the Letters Patent of 1921 shall have effect "as if there were thereby reserved to His Majesty full power to revoke or amend by any further Letters Patent any or all of the provisions of the Malta Constitution Letters Patent, 1921, as subsequently amended." Nevertheless, the Malta Court of Appeal, basing itself

² Hansard, vol. 390, coll. 2,078-2,079.

³ White Paper 1921 [Cmd. 1,321].

⁴ *The Constitution of Malta*, Journ. Comp. Leg., 3rd series, vol. 7, pp. 91-5.

⁵ *Ibid.*, vol. 12, p. 291 and vol. 14, p. 131.

⁶ [1774] 1 Cowp. 204.

on Lord Mansfield's judgment in the leading case of *Campbell v. Hall*⁶, held that once representative institutions are granted to a Colony, the Crown is immediately and irrevocably deprived of its right to legislate by Letters Patent or Orders in Council unless there is an express reservation of a right to that effect⁷. This interpretation did not, however, commend itself to the Privy Council which decided that Lord Mansfield's proposition was dependent on the continuous existence of the local legislative institutions so that immediately the grant of self-government was revoked, the Royal Prerogative was revived⁸.

Another serious reproach addressed to the Malta Constitution of 1921 was that it had set up an unnecessarily intricate machinery and that its successful operation was subject to the smooth working of not less than five bodies:—The Senate, the Legislative Assembly, the Executive Council, the Nominated Council and the Privy Council of Malta. It should not, however, prove beyond the political statesmanship of the Maltese people to devise an effective and simplified constitution dealing with the transferred and residuary matters only, and leaving the reserved matters to be regulated by a separate instrument in the form of the usual "Instructions" to the Governor. Indeed, the Colonial Secretary made it plain in his statement of July 7, 1943, that the wishes of the Maltese people will, as far as possible, be given expression to in the framework of their future constitution. It is they, after all, who will have to work it and try to make it a success in practice. Enlightened opinion in Malta has for many years now demanded that the island should be granted a position within the Empire equivalent to a dominion status in internal affairs, on the analogy of South Rhodesia whose constitution was patterned on that of Malta⁹. In view of the steadfastness and heroism of the Maltese people, their political maturity and their deep loyalty to the Crown ever since they voluntarily placed themselves under British protection in 1800, their national aspirations appear to be fully compatible with the claims of Imperial defence.

C. J. C.

The Guernsey Matrimonial Causes Law, 1939. — Our Review of Imperial Legislation, 1939, contained some account of the interesting Matrimonial Causes Law of Guernsey by our correspondent, Mr. Griggs, an appropriate exposition of which, as he remarked, would require a somewhat lengthy article. Mr. Griggs has since been good enough to furnish such fuller exposition, and although present circumstances and restrictions make its complete publication an impossibility, we are glad to be able to print extracts therefrom dealing with the more interesting features of the law and having special reference to problems of Private International Law.

Condition of Exercise of Jurisdiction with regard to suits for Nullity of Marriage (Art. 33).

It is in general "a necessary condition of the exercise by the Court of its jurisdiction in suits for nullity of marriage that—

"(1) the marriage was celebrated in the Bailiwick; or

"(2) the parties to the marriage are domiciled in the Bailiwick when the suit is instituted;

"Provided that—

"(a) where the sole ground of the petition is that the marriage in respect of which the petition is presented was bigamous on the part of the respondent, the Court may exercise jurisdiction if the petitioner is domiciled in the Bailiwick when the suit is instituted."

The Law was drafted before the criticism of *White v. White*¹⁰ by Dr. Cheshire¹¹ and Mr. J. H. C. Morris¹² was published. Nevertheless, it has been commended to Guernsey as being both technically sound and well suited to the ends of justice.

Mr. Morris disapproves of *White v. White* for the reason that "the English Court assumed jurisdiction on the ground that the petitioner was resident in England, though the ceremony took place abroad and the respondent was domiciled and resident abroad." Further, after quoting Bucknill, J.'s observation that "it would be quite unsound to hold that in the case now before us the petitioner ever acquired the domicile of the respondent, either in law or in fact," Mr. Morris deduced that "this remark was obiter because the decision was founded on the petitioner's residence, not on her English domicile." This criticism, however, it is submitted, cannot be sustained. Bucknill, J. holds, as he is entitled to hold on the facts, that "the petitioner is domiciled and resident here." It is submitted that the ratio decidendi of *White v. White* is accurately stated in the headnote in report in the Law Reports:—

"On a petition by a woman for nullity of a form of marriage contracted in a foreign country, on the ground of the bigamy of the man, the domicile of the man is not an essential ingredient to found jurisdiction." This principle appears to be alike scientifically consistent and socially laudable.

⁷ *Strickland v. Sammut* (1937), unreported.

⁸ [1938] A.C. 678.

⁹ S.R. & O. (1923), p. 1,078.

¹⁰ [1937] P. 111; 53 T.L.R. 442.

¹¹ *Private International Law*, Ed. 2 (1938), 343.

¹² *Cases on Private International Law*, 178 seq.

Dr. Cheshire, though acknowledging that "there is of course weight in the contention that in *White v. White* the petitioner never acquired the domicile of the respondent," and that "there was a complete absence of cohabitation," asks whether, "for the sake of uniformity, would it not be better to go one step further and to rule that a mere performance of a marriage ceremony invests the parties with a common domicile?" and adds, "In this way simplicity would be restored to the law." It may, on the other hand, be urged that the fact that our courts had not taken that "one step further" enabled Bucknill, J., to avoid inflicting a gross social injustice on the petitioner then before him. It is submitted that a simplicity to be attained at the price of investing a criminally fraudulent ceremony with a cruel legal potency, in iniquitous circumstances which do, in fact, occur, is a simplicity much to be deprecated.

The effect of a second part (b) of the proviso to this Article is that in a suit for nullity on the ground of impotency, refusal of consummation, pregnancy by a person other than the petitioner, venereal disease, or recurrent fits of insanity, etc., "or on any ground on which a marriage would by law in the Bailiwick have been voidable before the enactment of this law, the Court shall exercise jurisdiction only if the parties to the marriage are domiciled in the Bailiwick when the suit is instituted."

Grounds for Decree of Nullity (Article 34).—Section 7 of the Matrimonial Causes Act, 1937, which enacted "New grounds for decree of nullity" for the English jurisdiction, did so by way of addition to "any other grounds on which a marriage is by law void or voidable." Guernsey was setting up an entirely new civil jurisdiction for matrimonial causes. It was therefore desirable, in the Guernsey law to state the grounds for a decree of nullity rather more at large; and the opportunity was taken to include a concise codification of the relevant principles of Private International Law, as administered by the English courts. The Article is as follows:—

The Court may decree the nullity of a marriage on any of the grounds mentioned in paragraphs (1) to (9) of this Article, as well as on any other ground on which a marriage is by law void or voidable:—

(1) The continuing impotency of one party or of both parties to the marriage since the celebration thereof;

(2) That the marriage was celebrated through fraud, threats or duress by the respondent upon or to the petitioner;

(3) That the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage;¹³

(4) That the respondent was at the time of marriage pregnant by some person other than the petitioner, unless the pregnancy resulted from intercourse which occurred between the respondent and a former husband during the subsistence of their marriage;¹⁴

(5) That the respondent was at the time of the marriage suffering from venereal disease in a communicable form;¹⁵

(6) That either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the "*Loi ayant rapport aux Faibles 'Esprit'*" of 1926;

(7) That either party to the marriage was at the time of the marriage subject to recurrent fits of insanity or epilepsy;¹⁶

(8) That the marriage in respect of which the petition is presented was bigamous on the part of the respondent;

(9) (i) That the marriage has been annulled by the competent court of an extraneous jurisdiction in which the party who is the respondent in the proceedings in the Bailiwick was domiciled when the suit for such annulment was instituted in such extraneous jurisdiction, if the annulment was made upon one of the grounds mentioned in paragraphs (1), (3), (4), (5) and (7) of this Article, or upon some other ground whereby the marriage was lawfully voidable in such extraneous jurisdiction; and

(ii) That the marriage has been annulled by the competent court of an extraneous jurisdiction in which—

(a) the party who is the respondent in the proceedings in the Bailiwick was domiciled when the suit for such annulment was instituted in such extraneous jurisdiction, or

(b) the marriage was celebrated;

if the annulment was made upon one of the grounds mentioned in paragraphs (2), (6) and (8) of this Article, or upon some other ground whereby the marriage was void *ab initio* in such extraneous jurisdiction: Provided that—

(a) in the cases specified in paragraphs (1), (3), (4), (5) and (7) of this Article, a decree may be granted only on the petition of a party to the marriage; and

(b) in the cases specified in paragraphs (4), (5), (6) and (7) of this Article, the Court shall not grant a decree unless it is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

¹³ Matrimonial Causes Act, 1937, sec. 7 (1).

¹⁴ Down to and including the word "petitioner," this paragraph is from the Matrimonial Causes Act, 1937, sec. 7 (1) (c).

¹⁵ Adapted to Guernsey Law from the Matrimonial Causes Act, 1937, sec. 7 (1) (b).

¹⁶ Matrimonial Causes Act, 1937, sec. 7 (1) (b).

- (ii) that the proceedings were instituted within a year from the date of the marriage ; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.¹⁷

Death of Party after Decree (Article 54).—This Article, it is hoped, will prove to have furnished a practical solution to a difficulty which must inevitably present itself, from time to time, in administering this law. The ruling principle is stated in paragraph (1).

"(1) In the event of the death of either of the parties to a suit for a decree of divorce or nullity of marriage, after the marriage has been dissolved or declared void, but before any definite order under this part of this law has been made, the Court may make any such order as aforesaid which it could lawfully have made if such death had not occurred, and the said order shall take effect as if it had been made immediately before the death.

"(2) The Court may make an order under this Article on the application of any person who is, in the opinion of the Court, an interested person, if the Court is satisfied that notice of the proceedings has been given to every person whose interest may be affected by the order or to the attorney of such persons."

Private International Law.—The Bailiwick of Guernsey and the Bailiwick of Jersey are foreign jurisdiction to each other. This fact, coupled with the intimate social and commercial relations existing between the two groups of islands, and—up to the war—their constantly increasing rapport with "the mainland"—i.e. England, not the geographically contiguous land of France—had given a growing practical importance, alike in Chambers and the Courts, in the Channel Islands, to the doctrines and practice of Private International Law. References may have been observed, in the earlier parts of the Matrimonial Causes Law already cited, to "extraneous" jurisdiction, that alternative expression having been adopted in the draft for the greater convenience of the preponderant lay majority of the Bench throughout the judicial system, to whom the technical use of the term "foreign" would not necessarily be self-explanatory.

The existence of these judicial frontiers between the two Bailiwicks, and between both of them and the rest of the world, has obliged their practitioners and courts, not infrequently, to concern themselves with questions of Conflict of Laws. The islands, indeed, have had, and, with the ejection of the invaders, will have again, excellent opportunities for the examination and elucidation of the problems of Private International Law, provided a professional judiciary be substituted for the lay justices of the islands. The Channel Islanders, however, have long cherished their ancient, honorific office of Jurat, election to which confers membership of both the Royal Court and the States, which are of much wider than local interest, and some of these are the subject of a supplementary note.

Property Subject to Extraneous Law.—Article 58, under this title, enacts an important practical principle, which has been worked out in the English courts. It requires that the Court, in determining whether to make, or decline to make, an order or orders under Part VIII (sup.), "respecting any property which, by reason of a marriage contract or other agreement, trust, arrangement or otherwise, is subject to the law of an extraneous jurisdiction," shall have regard to "the question of the legal effectiveness, outside the jurisdiction of the Court, of the order or orders which the Court might make."

The two ensuing Articles may perhaps be of interest in *extenso* :—

Decree in Extraneous Jurisdictions (Article 59).—(1) A final decree of divorce made by a court of competent jurisdiction in an extraneous jurisdiction shall be recognized as a valid decree in the Bailiwick—

- (i) if the husband was domiciled in such extraneous jurisdiction when the proceedings resulting in such decree were instituted ; or
- (ii) if the competent courts of the husband's domicile would recognize the decree as valid although the extraneous jurisdiction in which the decree was made was not the jurisdiction of the husband's domicile.¹⁸

and a marriage contracted by either of the parties to a marriage so dissolved by divorce, whether before or after the commencement of this law, shall not be deemed to have been or to be void or voidable by reason of the pre-existent marriage so dissolved by such divorce :

Provided that the proceedings in the form of the decree did not, according to the principles of legal process in the Bailiwick, involve substantial injustices.

(2) Where the marriage was lawfully celebrated in the Bailiwick, a decree of nullity made by a court in an extraneous jurisdiction on the ground that some formality, not required by law in the Bailiwick, was not observed, shall not, except as a ground for the making of a decree in pursuance of Article 34 (entitled "Grounds for Decree of Nullity") of this law, be recognized by the Courts of the Bailiwick.

(3) A decree of judicial separation made by a competent court in an extraneous jurisdiction in which the parties were either domiciled or resident when the proceedings resulting in such a decree were instituted shall be recognized as valid in the Bailiwick.

¹⁷ Sub-paragraph (b) of this proviso is based upon the proviso to sub-section (1) of section 7 of the Act of 1937.

¹⁸ *Armidge v. A. G.* ; *Gillig v. Gillig* (1906) P. 135.

Union Catalogues.—The destruction of libraries, especially of those containing law books, has been so considerable that the compilation of Union Catalogues becomes a matter of practical interest. The American Library Association has published a comprehensive work on the "Union Catalogues in the United States," from which it appears that they are primarily designed upon a territorial basis. Research into the history of the subject has traced that the first proposal for such a catalogue was made in 1651 by Gerard Langbaine, Provost of Queen's College, Oxford, and keeper of the University archives. He wanted—what is still a desideratum—a catalogue combining the contents of the college libraries with the University library. There is, however, in this country under the auspices of the National Central Library an extended system of Regional Union Catalogues, which is regarded as a model to be followed in the larger areas of the United States. These catalogues are devoted solely to author entries. Very little has been done to compile this kind of catalogue to deal with any particular subject. Mr. A. B. Berthold in this volume provides a list of only seven which are available anywhere in the United States. There are, as he points out, special difficulties in dealing with them as compared with those confined to authors. There is at the outset the definition of the subject. This was solved in the case of the Chicago Union Catalogue, which is the only one relating to law, by including all the books in the four Law Libraries covered by it. This undertaking has already received notice in the Society's *Journal* (Vol. XXII, pp. 230–231), and from the information now available it appears that the impetus for founding Union Catalogues in the United States came from "the sudden availability of a mass of free labour from federal government relief agencies." This no doubt accounts for the large number of persons employed, though it does not explain how apparently untrained people could undertake competently such a technical matter as the compilation of a catalogue containing law subjects. In the Chicago catalogue the headings of the Library of Congress Catalogue are in use, though even then it is appreciated that "Uniformity of interpretation and consistency in application are of the utmost importance." For any consideration of the subject which may be desirable in this country the volume issued by the American Library Association is informing and suggestive.

Within the British Empire a fine piece of pioneer work has been done by Mr. A. A. Roberts, Law Adviser to the Government of the Union of South Africa, who has just published a *South African Legal Bibliography* (Wallachs' P. & P. Co., Pretoria, 45s.). It is the result of more than twelve years' work in obtaining particulars of the books on the subject of Roman Dutch law in the libraries in South Africa, including a number in private possession. In the course of his journeys, Mr. Roberts estimates that he has travelled over 16,000 miles. The result is not strictly a union catalogue, since the primary object of the volume is to present a comprehensive bibliography of Roman and Roman Dutch law books in the country, though the result, even then, does not claim to be "exhaustive." Mr. Roberts has set himself the difficult task of appraising the value as authorities of the books which he has examined in the course of his travels, and so determining whether he should include them. It is, therefore, only incidentally that his work has become a Union Catalogue as, in order to save others the labour which he has undertaken, he notes where the books are available. In the course of making the catalogue entries Mr. Roberts has also provided a certain amount of bibliographical material.

The Bibliography, broadly speaking, provides particulars of the books available on the subject in the libraries within the Union, but addition has been made of others when their importance justified it. As a result of his survey Mr. Roberts reports:—

"There are thousands of works in big overseas libraries not to be found in South Africa and not likely ever to be so found. On the other hand, the aggregate of books in our libraries is, in my view, enough for ordinary purposes of study or practice, and few of our libraries are likely to go beyond filling gaps by the acquisition of works already included in this bibliography and other then recently published books."

This conclusion does not altogether seem to be a happy one. Although one fine collection of Roman Dutch law books has been completely destroyed, as well as another not so comprehensive, it would seem as if co-ordination of available material in London should enable some transfers to be made so that one copy of desirable works is available in the Union. Before that can be done, however, there must be compiled a union catalogue of law books in at least the principal London law libraries. The industry and enthusiasm of Mr. Roberts have shown what can be done by one man. Although the task in London is on a much larger scale, it is within a more manageable area and should be regarded as the provision of one of those essential pieces of information necessary as a basis for any satisfactory scheme of post-war reconstruction.

C. E. A. B.

International Law and the League of Nations.—The causes which led to the failure of the League—that light which had shone upon the nations walking in darkness—are not open to serious controversy. A more debatable point is the extent to which, in practice, the League—like the Delphic Amphictiony centuries ago—can be said to have proved a more powerful influence for evil than for good. Its critics, for instance, can urge with a show of reason that its ineffective interference in the Abyssinian dispute served only to precipitate the present war by throwing Italy into the arms of Germany. The League's ineffectiveness, however, was largely due to its defective constitution, and that itself was but the consequence

of the inability or reluctance of the authors of the Covenant to cast aside the fetish of state sovereignty, the very cause of the growing eclipse of international law which the foundation of the League had been intended to arrest. In this connexion it may be pertinent to recall the story which—without vouching for its authenticity—Professor J. Kerr Wylie told the Foreign Relations Society of Cape Town University, in the course of his address on the Nature of International Law on September 16, 1941.¹⁹ The late Lord Birkenhead, it appears, was asked after the last war to revise a summary of international law which he had written in his younger days. He declined to do so on the ground that in his opinion there was no longer any such thing as international law.

Professor Kerr Wylie, for his part, considers that the present war will usher in a new international order characterized by the formation of several great confederations of states. Each confederation would operate as a super-state with regard to the component states, the relations between which would, as far as possible, be governed by a body of super-state law. For the regulation of the relations between the various confederations, on the other hand, the main reliance would have to be placed on diplomatic agencies and methods in view of the difficulty of building up an inter-confederation law. Professor Kerr Wylie deprecates the idea that all international disputes can be settled by legal means, especially where the disputants are powerful states or groups of states, and the interests involved are important. The League of Nations, he points out, did not profess to be a super-state and, on that assumption, could not impose sanctions of a legal nature. Yet Article 16 of the Covenant, in substance if not in so many words, gave it that power, thereby placing it in the position of a super-state. To this ambiguous character of the League he ascribes its downfall—a catastrophe which, in his opinion, was inevitable the moment an attempt was made to enforce Article 16 against a strong power.

Another reason for the League's collapse is assigned by Dr. Hans Kelsen in his lectures at the Harvard Law School²⁰—what he calls “a fatal fault of its construction.” The Covenant, he contends, should have placed at the centre of the League a judicial body, e.g. the Permanent Court of International Justice, with compulsory jurisdiction, and not a kind of international administration, the Council, with a sham Parliament at its side in the shape of the Assembly. This, in his view, would have made it possible to apply the majority principle. “On this point, the attitude of states towards international courts is, as a matter of fact, wholly different from their attitude towards all other international organizations,” and in support of this contention he quotes the introduction into the constitution of the Permanent Court of International Justice of the majority principle which was systematically excluded from the procedure of the Council of the League.

On the topic of future international organization, Dr. Kelsen considers that so long as it remains impossible to unite states in a federation the task of a League of Nations should be confined to the maintenance of internal peace, i.e. the settlement of disputes between member states, and that protection against external aggression should be ensured by political alliances between the member states.

“The duty of a state which is a member of a universal international community to defend another member state from attack by a non-member is very problematic, especially if the international organization embraces many states which have no common frontier, if these states have joined—in the first place—for the purpose of maintaining peace among one another, and if aside from this purpose they have no political interest in common that might unite them against the aggressor.”

To this one may object that recent history has discredited the test of common frontiers by geographical standards and exposed the short-sightedness of neutrality as a policy in the present world. “Le peuple qui souffre près de lui l'oppression d'un autre peuple creuse la fosse où s'ensevelira sa propre liberté.” These words are even truer to-day than a century ago when Lamennais wrote them.

To conclude, there is a general consensus of opinion on the need for a limitation of the sovereignty of states. The debate turns on the extent to which and the manner in which this can and should be done. One thing is clear. Whatever shape the international organization attempted after the war may take, its success in the long run will depend on the ability of the community of nations to compel respect for the fundamental principle of international law: *Pacta sunt servanda*. The gradual disrepute into which the League of Nations fell must be attributed in part to its endeavours to palliate by skilfully worded resolutions its signal failure in this respect—an instance of the belief in the power of phrases to alter facts.

M. F. P. HERCHENODER.

Income-tax in Kenya.—Owing to the vicissitudes of war, the judgment of the Chief Justice of Kenya in *Commissioner of Income-tax v. Errol* has only just reached us. The case is of more than usual interest since it turned not upon the technicalities of income-tax law but upon the constitutionality of the local Income-tax Ordinance.

The Court held that Kenya was a colony which had been acquired by “settlement” and not by “cession or conquest,” despite the statement to the contrary in Hailsham's Laws of

¹⁹ *The South African Law Journal*, November 1941, p. 354.

²⁰ *Law and Peace in International Relations, The Oliver Wendell Holmes Lectures, 1940–41.* By Hans Kelsen. (Harvard University Press, 1942.)

England, Vol. II, para. 12. Incidentally, the Kenya Colony Order in Council, 1921, recites that the colony was a British Settlement within the meaning of the British Settlements Act, 1887. By s. 3 of this Act, the Queen in Council was empowered to delegate to three or more persons in such a colony all the powers vested in her under the Act, including (s. 2) power to establish such laws, etc., as might be necessary for the "peace, order and good government" of the colony. Under the provisions of this Act, Letters Patent had been issued in 1920 establishing a Legislative Council to which was delegated under s. 3 of the above Act power to make such ordinances *as were not repugnant to the laws of England* . . . and as might be necessary for the "peace, order and good government" of the colony. The Council used these powers to promulgate in 1937 an Income-tax Ordinance.

It was argued for the respondent that the settlers in the Colony carried with them all the laws of England, including immunity from arbitrary taxation, that the Ordinance was *repugnant* to the great English constitutional statutes in this regard, e.g. the Petition of Right, 1627, and the Bill of Rights, 1687, and that, in any event, the levying of a direct tax on incomes was not a power necessary for the "peace, order and good government" of the Colony. The Chief Justice, drawing on decisions in English and Imperial Courts upon analogous statutes, upheld the constitutional validity of the Ordinance.

Blackstone (1 Com. 107) long ago made it clear that English "settlers" in uncivilized countries do not carry with them the whole body of English law, but only so much as is applicable to an infant community; his opinion was upheld by the Privy Council in *Cooper v. Stuart* (1889) 14 App. Cas. 286. Examples of inapplicable law are the Statutes of Mortmain, *Mayor of Canterbury v. Wyburn* (1895) A.C. 89, and ecclesiastical law, *Lord Bishop of Natal* (1864) 2 Moo. P.C.115.

On the question of the repugnancy of the Income-tax Ordinance to the laws of England, i.e. because it violated the rule laid down by the Bill of Rights, 1687, denying the Crown the right to levy taxes without the consent of the Commons, the Chief Justice held—on the analogy of similar words in s. 1, Colonial Laws Validity Act, 1865—that the laws in question must be such as were applied to the Colony by express words in an Imperial Act, *c.f. Reg v. Marais* (1902) A.C. 51. Express words in a colonial law were not repugnant to general words in an Imperial Act, even though these were set out in our great constitutional statutes; *Rex v. Crewe* (1910) 2 K.B. 276 had held that a proclamation issued under the Foreign Jurisdiction Act, 1890, abrogating a British subject's right to a writ of *Habeas Corpus* was valid despite a similar "repugnancy" section, 12, in that Act. An exception to this rule is that general words in an Imperial Act which apply to *all* territories of the Crown or to *all* British subjects wherever resident, would over-ride express contrary words in a colonial law *c.f. The Slave Trade Act, 1843*. In any event no question of arbitrary taxation arises, since the Income-tax Ordinance had been promulgated under powers specifically delegated to the Crown by the Imperial Parliament which had enacted the British Settlement Act, 1887.

The main argument, however, against the validity of the Ordinance was that direct taxation of incomes was not a power necessary for the "peace, order or good government" of the Colony, so that the imposition of an income-tax was without the jurisdiction of the Legislative Council (*c.f. supra.*).

Although on first principles these words would justify the levying of an income-tax, the Chief Justice showed, from analogous decisions of the English Courts, that identical words in other statutes vested in a colonial legislature the utmost discretion for the attainment of the objects in question. The Parliament of Canada was given power, by 34/5 Vict. C. 28, to make provision for "the administration, peace, order and good government" of any extra-provincial territory; a local statute modifying the English law of treason was held to be *intra vires* by virtue of these words, see *Riel v. Reg.* (1885) 10 App. Cas. 675. In *Rex v. Crewe* (1910) 2 K.B. 576 an Order in Council issued under the Foreign Jurisdiction Act, 1890, abrogating the right of a British subject in the Bechuanaland Protectorate to a writ of *Habeas Corpus* was held to be valid by reason of identical words in s. 11 of that Act.

No objection on the ground of *ultra vires* or unconstitutionality appears to have been raised against similar Income-tax Ordinances in other Crown Colonies, and it is not surprising, therefore, to find that the judgment in the instant case was affirmed by the Court of Appeal for Eastern Africa.

A. FARNSWORTH.

Divinarum Humanarumque.²¹—In the introduction to the *English and Empire Digest*, Sir Thomas Wiles Chitty pointed out that two systems of law and legal tradition rule the world. In the era before Hitler, the Roman system of law and legal tradition governed all the great countries of Europe and their non-European dependencies. The English system of law governed England and Ireland and Canada and Australia and New Zealand and (by statutory enactment) in large measure India, and most of the Colonies: and all the States (save one) of the American Union.

Now the system of the Roman Law, which has a history of 25 centuries, is in origin pagan. It makes an essential distinction between citizen and stranger, and between freeman and slave. It has no knowledge of the representative system as we know it; and it is totalitarian in spirit and in inclination: "The vice of the classical state," as Lord Acton said, "is that it is Church

²¹ *The Movement for a Neo-Scholastic Philosophy of Law in America.* By Dr. Miriam Theresa Rooney. Reprinted from the Proceedings of the American Catholic Philosophical Association, 1942.

and State in one. . . . In religion, morality and politics there was only one legislator and one authority."

The Common Law of England, which has a history of seven centuries, is in its origin a Christian system. It is in fact the only great system of temporal law that came out of the Christian centuries. It has a noble conception of man and a noble conception of law; of man as a reasonable being and of law as a reasonable rule.

And since man is a reasonable being, he is of his nature free. *Est autem libertas naturalis facultas ejus*. Slavery and servitude are roundly declared by Bracton to be *contra naturam*, against natural right. And the Christian sense of human personality leads to the separate organization of Church and State, which (as Dr. Carlyle has shown) was intended to secure that the moral and spiritual life of man should be outside the control of the political organs of the community. Moreover, again according to Bracton, the king is under God and the law. *Non est enim Rex ubi dominatur voluntas et non lex*. The Common Law conception of politics is of a society of free men living in the fellowship of a free community.

With the decline of Christian influences in the life and in the law of England, there has happened also (perhaps it was inevitable) a decline in the conception of freedom and a decline in the whole vitality of the Common Law. In his little volume on the history of the Common Law, Professor Plucknett has a strong word to say upon the subject: "There soon came the State as a sort of anti-Christ to wage war with the idea of law. The issue of this conflict is still perhaps uncertain, but medieval thought is to-day fighting hard for the cause of law against the amoral irresponsible State. It was medievalists in England, armed with Bracton and the Year Books, who ended Stuart statecraft. . . . It was Machiavelli himself who gave us the word state and filled it with the content we now associate with it. Instead of medieval dominion based upon divine right and subject to law we have the modern State based upon force and independent of morality."²²

The great historians of the law like Maitland and Holdsworth and Plucknett have indeed done much to revive the medieval principles of the Common Law in this country. And in this little pamphlet on the movement for a neo-scholastic philosophy of law in America there is revealed the outline of an organized attempt in the United States of America to preserve the old philosophy of the Common Law against the forces that are opposed to it. For in the United States (as in England) the conviction has arisen that "there is here and now in our day and in our land, as well as throughout the world, a direct and purposeful attempt to destroy the Common Law and indeed law in general, and that this movement is centering its gunfire upon the elements of scholastic jurisprudence which are dominant in that law" (p. 16). The efforts of the American Catholic Philosophical Association are accordingly directed "not to create but to preserve" (p. 17) the historic philosophy of the Common Law. The pamphlet gives a record of its activities during the period 1932 to 1942.²³ It is a notable record, carefully documented, and instinct with the sense of the urgent need of a return to a conception of law "which is spiritual and ethical, serious and profound, vivified by the warmth of a true humanity and illumined by the splendour of the Christian faith." To those who share the desire for such a conception of law, this little pamphlet will be at once a consolation and an encouragement.

R. O'SULLIVAN.

Compensation for Mental Suffering.—*Bourhill v. Young* (1943, A.C. 96) has recently made a departure from the series of decisions in which the Courts have allowed damages for shock, even in the absence of any impact. This and a number of other cases come under review in a note in the *Columbia Law Review* (March, 1943, Vol. 43, pp. 219) devoted to the subject of Compensation for Mental Suffering. Primarily, the discussion is devoted to showing that the law in the Argentine Republic is less liberal than in the United States, as the Courts of the former decided that damages could not be given for non-pecuniary injuries when criminal proceedings had not been taken against the driver in a traffic accident. The Argentine Law distinguishes between compensation for pecuniary loss, and for non-pecuniary injuries. Although there is some difference of opinion, as a general rule the latter is only compensated in some types of tortious acts and only where the tort is criminal. Further points arise in restricting recovery where there has been a conviction or an intentional criminal wrong. Reference is made to the "shock" cases as an example of the greater liberality of the common law and the protection accorded to the interest in mental and emotional security, whereas the civil law has so far shown no inclination to give redress in any comparable situation. The note goes on to point out that reluctance to allow compensation for non-pecuniary harm is common to all civil law countries, though it varies in degree from the hostility of the German law to the liberality of the French with Italy, Spain, Belgium, Switzerland and the Latin-American Republics occupying intermediate positions. It is added, however, that "these divergencies are of little practical importance since even where lip-service is paid to a liberal view, sums awarded for mental suffering are meagre by comparison with those awarded by Anglo-American courts." Finally, this admirably documented note, with references to the laws of the various countries, concludes: "Civil law writers have advanced three main reasons to justify this negative attitude. Only one of these, the difficulty

²² Plucknett: *A Concise History of the Common Law* 3rd edn., pp. 40-41.

²³ It is of interest to read (p. 18) that since 1936 there has been in existence in the United States a society called the St. Thomas More Society of America which devotes itself primarily to the study of his significance in the legal world.

of measuring mental harm with a monetary yardstick, is adverted to in both legal systems. A second, that it is immoral and a sign of contemptible materialism to compensate mental suffering with the soothing balm of money, reveals an attitude foreign to Anglo-Saxon thinking. Finally, the civil law is unwilling to vest tribunals with the discretionary powers traditionally wielded by the common law jury. This unwillingness may account for the very absence, in civil law countries, of jury trials in non-criminal cases. The spirit and institutions of the common law thus allow here, as in other fields, for greater individualization and wider discretion in the administration of civil remedies."

Dr. Léonidas Anastasi.—The current volume (XII) of the *Anales de la Facultad de Ciencias Jurídicas y Sociales de la Universidad de la Plata* is dedicated to the memory of Léonidas Anastasi, who held the Chair of Labour Legislation at the University of La Plata. He graduated at that University and had a distinguished academic career. By his colleagues—some of whom were his pupils—he was held in high esteem, and generally exercised great spiritual influence not only in academic circles, but also as member of the Argentine Parliament (1920-38). His work covered a wide field. He founded (together with the pioneer of teaching of Labour Law in the Argentine, Professor Unsain) the *Revista de Trabajo*. With Dr. Jofre he founded and edited the well-known *Jurisprudencia Argentina*—an invaluable guide for the student of case law—and then published and edited *La Ley*, an important legal periodical. Anastasi's views were not expressed in one systemic work—they are to be found in his lectures, speeches and in about 200 contributions to periodicals. Doctor Carnelli gives an admirable summary of Anastasi's publications (pp. 1-111) which enables the reader to appreciate the contribution of Anastasi to the clarification and development of Argentine Law.

Anastasi contributed to almost all branches of Law, but as Dr. Carnelli points out, it would be of no avail to seek a "system" in his work. However, Anastasi has been—not incorrectly perhaps—described as a "distinguished jurist, systematizer of the Labour Law of the Argentine" (Professor Figueroa, p. 360). Labour Law to him was a branch of Civil Law (Dr. Perez, p. 608) and not a part of Public Law, but he found in civil law enough guidance and inspiration to work for the progress of labour legislation towards better protection of the workmen and recognition of the duty of the community to protect the weaker party to the contract of personal service. Anastasi took an active part in international co-operation in the field of social and labour legislation and often represented the Argentine at international conferences. His public activities, and above all his lectures and seminal, impressed on his generation his progressive views and his ardent advocacy of the reform of labour law.

In the admirable contributions to this volume of the *Anales* as well as generally in the Latin-American literature on Labour Law, one discerns three main currents of thought. The ideas of the Roman Catholic Church expressed in the encyclical *Rerum novarum*—"The Magna Carta of Social Catholicism" (see Alperio in *Revista Internacional del Trabajo*, October, 1941)—calling for especial protection of the workmen by the State, is the first of these currents. The Socialistic current, the striving not only for the settlement of labour conditions, but also for a constantly increasing share of the workmen both in the national income and in the economic organizations, becomes stronger with the growth of the Socialist movement. The third current of thought comes mainly from Italian jurisprudence and legislation, and is in the direction of "non-political" reform.

In the Argentine all these three currents are strong, if not equally strong. The numbers of workmen and employees in industry, commerce and agriculture are steadily increasing. The problems of labour law and all questions of welfare of workmen are becoming more important. The help in the study of labour law and in the preparation of new legislation is generously given to the community by Argentine jurists whose works are collected in this volume of the *Anales*.

The papers collected in it are of great interest. Dr. Pérez vigorously defends the autonomy of Labour Law and disapproves of its being treated as a part of civil law. Professor Pinto deals with the problem of minimum wage in its international and national aspects. Professor Desmarás gives a vivid picture of facilities for holidays of workmen provided in the Argentine by different organizations. Professor Frescura explains in detail the labour legislation in Paraguay. Professor Ossorio states the law of the Argentine as to accidents to workmen, while Dr. Gronda reminds us of the contribution of Dr. Anastasi to the clarification of the principles of responsibility for such accidents. Professor Leiserson describes the main trends of thought in U.S.A. on the problem of wages.

These contributions reflect in different degrees the influence of Dr. Anastasi. His powerful personality is described in a masterly way in the papers by Dr. Lamas and Professor Unsain, as well as in the introductory study of Professor Carnelli. V. R. IDELSON.

Labour Legislation.—In the "White Paper" (Colonial, No. 185, H.M. Stationery Office, 6d.) issued by the Colonial Office surveying the progress of Labour supervision in the Colonial Empire during the years 1937 to 1943, attention is given to the legislation which has been passed in many of the Colonies. It is observed that "the Colonial Office has encouraged Colonial Governments to replace obsolete or inadequate legislation by laws framed on more

modern lines and to introduce new legislation where this appears to be needed. The dangers of attempting too rapid progress are obvious, and careful consideration has had to be given to the conditions obtaining in each territory and the stage of development that has been reached. An example of this is Trade Union legislation, where experience has shown that in many Colonies the development of the trade union movement has not reached a stage at which it would be advisable to have legislation based entirely upon that of the United Kingdom. Attention has been specially concentrated upon securing the enactment in all Colonies of simple legislation giving effect to some of the more important International Labour Conventions which have been ratified by His Majesty's Government in the United Kingdom—in particular, the important group regulating the employment in industry of women, young persons and children and the employment at sea of young persons and children, the Convention relating to the protection of dock workers, the Convention relating to minimum wage-fixing machinery, and, of course, the group of Conventions which are primarily of Colonial interest, namely, the Forced Labour Convention, and the Conventions regulating the recruitment and the contracting of indigenous labour. Other activities include the preparation in 1937 by the Colonial Office Labour Committee of a comprehensive draft Model Workmen's Compensation Ordinance for East and West Africa, which was sent to the Governors of the East and West African Dependencies for consideration. Details of this legislation are given in the report and provide reference to the laws.

Back numbers.—Owing to the number of new subscribers there is still an urgent demand for back numbers. In particular copies are required of Volume XXII (1940), Part IV, and Volume XXIII (1941), Parts I and II, as a large part of the stocks of these numbers was destroyed by enemy action. The Hon. Secretaries are always glad to have offers of these or any earlier numbers.

Comparative Colonial Law.—A serious gap in the study of imperial problems has been filled by the institution of a Senior Research Fellowship in Comparative Colonial Law by Brasenose College, Oxford, to which Dr. C. K. Meek has been appointed. The work will be closely co-ordinated with the studies undertaken in modern politics and economics under the auspices of Nuffield College. At present the college is engaged upon a scheme of research to economic and constitutional questions in British Tropical Africa by a group of workers under the direction of the Reader in Colonial Administration, Miss Margery Perham. In addition, provision has been made for a further Lectureship in Colonial Administration. In this connexion it has been pointed out that this study is to be comparative in character and does not claim to teach officials how to administer. These arrangements have been made in close co-operation with the Colonial Office, and Dr. Meek's services as an Anthropologist in the Colonial Service are an assurance of the continuance of a close liaison.

Copyright in the Documents of Official International Bodies.—If official international bodies seldom market their publications commercially, they may wish to protect their copyright for various reasons—to check plagiarism, premature disclosure or the circulation of garbled versions, or even to meet part of their expenses. In the *University of Toronto Law Journal* (Lent Term, 1943) Mr. C. Wilfred Jenks, of the International Labour Office, Montreal, sets out the general position and makes suggestions which should be useful when the International Convention for the Protection of Literary and Artistic Works is next under revision. Not the least of the obstacles is the fact that United States Law, which allows no copyright in U.S. Government publications (or, apparently, in those of the constituent States either), may be unwilling to concede protection to the publications of international bodies.

Revision of Statutes.—Mr. J. L. Devaux, K.C., lately Attorney-General of Trinidad and now Chief Justice of Mauritius, and Mr. E. F. Maingot, the Crown Solicitor, are responsible for a revised edition of the Statutes of the Colony in six volumes, which contains an interesting new feature. The Ordinances are arranged under chapters which, it is intended, shall retain the same number in successive editions, so that the subjects will be always associated with the same chapters. Within the chapter headings are numerals covering the latest Ordinances. This suggests the possibility of a loose-leaf type of publication, though the satisfactory continuance seems to depend upon the Editor's assumption "that it should not be difficult to find a place for new Ordinances in one or other of the chapters and to assign to them their appropriate number under that chapter." It is an interesting departure which may deserve consideration elsewhere.

Political Influence on Law.—During the nineteenth century the relation between judicial activity and contemporary political tendencies was considered as a subject which was fit for scientific discussion only in so far as the history of a distant past was concerned. The modern judge, it was thought, stands high above politics. He applies "the law" uninfluenced by the ephemeral tendencies which surround him. He remains objective while politics are the scene of subjectivism, passion and partiality. Barely one-tenth of Dicey's classical work on law

and public opinion in England in the nineteenth century is devoted to the influence of political tendencies on English case law. This tenth deals with as innocuous a subject as the law of married women's property. This attitude is not yet entirely a matter of the past. Dr. Allen's book on *Law in the Making* makes no attempt at filling the gap which Dicey left. Its third edition of 1939 has nothing to say on Nazi, Fascist or Soviet doctrines on judicial interpretation and on the influence which they have exerted on the laws of their countries.

Dr. Silveira's interesting book²⁴, a shortened version in Spanish of a larger work published in Portuguese, knows no such restraint. But it is not an analysis of case law in the light of contemporary political doctrines. It is an examination of the theories of interpretation and of their relation to the political tendencies prevailing at the time when they were set forth. English lawyers will feel that this does not fully do justice to the differences between theory and practice and that an interesting task is still unsolved. In this country, for instance, the relation between the appeasement mood of 1933-39 and the cases on international law, decided here and elsewhere during that period, should prove a fruitful source of enlightenment. Dr. Silveira seems to assume that the courts are actually more or less guided by the doctrines of the scholars of their time—an optimism which is scarcely justified. But although the task which Dr. Silveira has set himself is not quite as interesting as the title of his book might lead one to assume, it remains a matter of considerable importance. Dr. Silveira has applied to its solution a learning which includes the latest doctrines not only of South America, North American and French, but also of German and Italian literature.

The author distinguishes the liberal ideology of the nineteenth century, the authoritarian doctrines of our times whose various shades he traces with care and impartiality, and the social-democratic outlook whose steady growth he notes in the U.S.A., Brazil, the Argentine and in pre-war France. He demonstrates the connexion between early nineteenth century liberalism and the doctrine of textual interpretation which the great French commentators, like Laurent, adopted. To the liberals the end of the law—to speak in Dean Pound's terminology—seemed to consist in providing guarantees for the freedom of the individual. The judge had therefore to keep strictly to the law as laid down in the text. What he did not find there he had to develop from the text by a logical process. The individual should be able to calculate beforehand whether and how the judicial mechanism would react to any given situation. All connexions between ethics and economic theory on the one hand, and the positive law on the other hand, had therefore to be cut. The law which started as a means to safeguard liberty became thus, in the end, a purpose in itself. The dissatisfaction which this barren theory produced, assisted in the rise of the totalitarian schools. The advance of the latter had been prepared by the Volksgeist theory of the historical school. To substitute the profit of the State for the spirit of the nation, and to consider as the end what had only been looked upon as the source of the law, was a comparatively minor operation.

But Dr. Silveira offers more than description and criticism of past and present. He includes a programme for the future which he sees already in the course of being gradually realized in the democratic countries. His ideal is the social-democratic state, destined to serve what Dean Pound (whose work is, strangely enough, nowhere mentioned) would call social justice. In Dr. Silveira's view this programme involves three tendencies: greater regard for the peculiarities of the individual case, a more intimate relation between law and ethics and closer attention to the needs of the social community as opposed to those of the individual citizen. These suggestions are partly applicable to English law as well. We, too, could do with what Dr. Silveira calls moralization and socialization, especially if the latter term is understood to apply to the relations between the citizens rather than to that between one or several citizens and the State. In fact, the tendency in our law of torts to impose more and more stringent restrictions upon the freedom of the individual in the interests of his neighbours, shows that our judges are alive to the necessities of the times, although precedents stand too often in the way of a more vigorous development of our law. On the other hand, our English case-law method has always guaranteed that the peculiarities of the case at issue should find the fullest consideration. The dangers of generalization have scarcely, if ever, threatened us. Rather are we beginning to enquire whether in the interests of the simplicity and the certainty of our law a greater attention to the evolution of more general rules would not be of some advantage.

In Brazil the new tendencies have found legislative approval in Article 5 of the new Introductory Law to the Civil Code of September 4, 1942, which requires the judge, when interpreting the law, to consider the social ends which it serves and the exigencies of common welfare. It would be a most important task to ascertain in how far this injunction and the general tendencies of our times have already been able to impose their influence on the Courts. Dr. Silveira would earn the gratitude of comparative lawyers if he would supplement his valuable research by a case study of the attitude of Brazilian and Argentinian Courts to the new tendencies which he has traced.

E. J. COHN.

²⁴ Alípio Silveira, *La Interpretación de las Leyes frente a los Regímenes Políticos*, Compendio. Prólogo de Luis Jiménez de Asúa, Professor Extraordinario de Derecho Penal de la Universidad de La Plata, 1943, 48 pp.

SOCIAL CONTROL THROUGH LAW.¹

In May, 1941, Dr. Roscoe Pound, former Dean of the Harvard Law School, delivered at Indiana University the Sixth Series of the Powell Lectures on Philosophy, choosing for his subject "Social Control Through Law," a topic at once congenial to himself and of much general interest at the present time. The Lectures are now published in a volume whose paper and typography strike a note of envy in these controlled and rationed days on this side of the Atlantic.

The Dean of a generation of American lawyers, as his publishers aptly describe him, here gives us the mellow and mature reflections of a legal scholar who in the autumn of his days surveys the harvest of his studies. Probably no one is more deeply read than he in the vast literature, chiefly American and Continental, which in the past half-century or so has been poured forth on the philosophy of law. But though these Lectures are manifestly the product of much reading and much thought, they are agreeably refreshing in outlook and attractive in style. They are persuasive rather than controversial, but their very moderation renders them the more effective. They will bring much comfort to those who have been affronted by the extreme doctrines of some modern exponents of legal science.

The main thesis which pervades the author's treatment of the various aspects of his subject is the vindication of the idealistic conception of law as against the materialist school which, in pursuance of a crude and acrid realism, would reduce law to a mere anticipation of what the judge will decide or to the arbitrary pronouncements of bureaucratic officials. We cannot, he is convinced, get on without a philosophy of law. Even the most practical of English lawyers, who is wont to pride himself on his superiority to mere theory, consciously or unconsciously is dominated by the ideal element in law. In his selection of precedents, in his process of reasoning, in the judgment which he is constantly called upon to form of what the reasonable man would do, he inevitably has recourse to the guidance of the principles of justice. It has indeed been said that some judges instinctively make up their minds to decide what they feel to be right in any given case and then proceed to look for precedent and precept to support their intuitive conclusions. It may be fashionable to decry natural justice as a vague phantasm, but its dictates still rule us. The pattern shown in the Mount remains impressed on our consciences.

As there are eras of faith and hope, so there are also eras of scepticism and disillusionment and to the fact that we have been passing through one of these latter eras Dean Pound attributes the decline of idealism and the growth of material opportunism which have afflicted this twentieth century. The inadequacy of our social system to cope with modern problems, as exemplified in two catastrophic wars, has engendered a despairing view of man's power to control his destiny by ordered law. The manifestations of this degeneration have been widespread. It is to be seen in the pursuit of the false and the ugly in the arts, in music, in painting and in literature, in a glorification of sheer licence and an abandonment of all discipline and reverence for authority. We see it in the magnification of force as the predominant power in the world and the outcome has been totalitarianism under which no one has any rights and justice is what the dictator arbitrarily decrees. "It is a paradox, no doubt, but so it is: absolute ideas of justice have made for free government and skeptical ideas of justice have gone with autocracy. Idealism puts something above the ruler or the ruling body; something by which to judge them and by which they are held to rule. . . . Skeptical realism puts nothing above the ruler or the ruling body. There is no measure by which to judge them" (pp. 28-29).

So much for the diagnosis of this malady of the soul of society. What of the remedy? "In the modern world law has become the paramount agency of social control" (p. 20), and in more and ever more social legislation the panacea is sought. The discipline of the family and of the church has tended to disintegrate. Sanctions wholly secular are replacing the sanctions of religion and morality. Now it is true that law and order are the essential conditions of the well-being of the body politic. But the spirit of law and order is something very different from mere obedience to the enforced dictates of legislation. It resides in the realm of the ideal. It must always be an aspiration, it can never be an achievement, *pace* the political perfectionists. That law has not hitherto perfected a system of social control is due to the fact that law like every other human institution is itself imperfect. But that is far from saying that law has not a great rôle to play in the social progress of humanity, not law in the mere sense of statutory enactments but law in the sense of the orderly conduct of human relations in conformity with the principles of what is just and right. We must needs go on adjusting, compromising, reconciling, for law is a practical matter of everyday life, but all depends upon the spirit which animates this process.

So the last of these Lectures is fittingly devoted to what is after all the most fundamental of all problems, the problem of values. We must have a standard by which to test our efforts to improve the legal regulation of society. The reference must always

¹ *Social Control Through Law*. By Roscoe Pound. (Newhaven, Yale University Press; London, Humphrey Milford, Oxford University Press.) Price in England, 13s. 6d. net.

be to an ideal. "An ideal of civilization, of raising human powers to their highest possible unfolding, of the maximum of human control over external nature and over internal nature for human purposes, must recognise two factors in achieving that control: on the one hand free individual initiative, spontaneous self-assertion of individual men; and on the other hand, co-operative, ordered, if you will, regimented activity" (p. 132). This may seem rather a statement of the problem than a solution of it. But that is the way with ideals. They must ever elude definition while maintaining their potent inspiration. The deity may be none the less worthy of worship because it is veiled.

"The question is this, is man an ape or an angel?" asked Disraeli at the Oxford Diocesan Conference in 1861, and the answer he gave was: "I, my lord, am on the side of the angels." It is consoling to find that so also is this eminent student of the law.

MACMILLAN.

CENTRAL BANKING.²

THE preface to Professor Plumtre's delightful book on *Central Banking*³ is dated August, 1939, and it brings us therefore to the end of the twenty years' period between the two wars. The development of Central Banking in the Dominions took place entirely within that period. The author gives us a description of that development, but he does much more than that. Without losing sight of his primary subject, he has a great deal to say on the principles of Central Banking in general, and on a number of ancillary subjects.

The following is an extract of the author's own short synopsis. Part I is primarily descriptive of the institutions which form the background for the historical and analytical material dealt with in the remainder of the book. Part II is historical, examining the forces which gave rise to a demand for monetary control in general and for central banking in particular, special attention being given to the question why central banks with a number of unsuitable features came to be established. Parts III and IV are analytical—scrutinizing the various instruments of control available to the Central Banks and investigating their usefulness—Part III being concerned with domestic or internal affairs and Part IV with international affairs.

This book, with its wide scope, deserves the epithet "delightful" for the freshness of its ideas and its clearness in presenting facts and arguments.

"There is something special about monetary policy which makes its administration more dangerous or more important than a state railway system or a state tobacco monopoly." This is one of the arguments used to sustain the plea for political independence of central banks, which Professor Plumtre distils from Kisch and Elkin's book on *Central Banks* (1928), and which he then proceeds to criticize. Deferring consideration of this point until later, we would say that in the process of distribution of production, money plays a very important rôle—and its machinery in modern times has become more and more intricate. Kisch and Elkin's book, referred to above, has, in the words of Professor Plumtre, been a standard work for many years—it had the imprint of authority, as no less a person than Mr. Montagu Norman wrote a foreword to it—but it was published in 1928, that is well before the boom of 1929 and its aftermath. The Macmillan report—as good a text-book on "banking, finance and credit" as any, was presented to Parliament in June, 1931, and dates therefore from before the abandonment of the gold standard by the U.K. As literature on the subject of Central Banking is not abundant, the appearance of Professor Plumtre's book is welcome from a general point of view as much as for its immediate aim, contributing freely to an extension of our knowledge of this complicated subject.

Professor Plumtre introduces the subject by observing that a certain development of the capital market is necessary for the machinery of central banking to become effective. He goes on to show the extent of such development at certain periods in the four Dominions with which he deals: South Africa, Australia, New Zealand and Canada—and points out the difference in development in these four countries. He makes it clear that Canada is the best developed of the four; that the immediate neighbourhood of the U.S.A. and its comparative proximity to the U.K. as compared with the other three were important factors in promoting Canada's progress. He traces the history of the establishment of these four central banks, and describes at length the peculiarities of each of the four capital markets, and how these have developed from early beginnings. This brings out the fundamental differences in the economic history of each of these Dominions—South Africa becoming mainly reliant upon its gold industry, Australia on wool export, New Zealand on export of dairy produce, whereas Canada has developed "a considerable measure of economic diversification."

Section I of Chapter VI, on "the Adoption of Central Banking," begins with the statement that "this world-wide demand trends towards nationalism." This, in our opinion, stresses the influence of nationalism too much, for, given an independent country where—in Professor Plumtre's words—"a certain development of the Capital market"

² *Central Banking in the British Dominions*. By Professor Plumtre. (University of Toronto Press, 1940.)

³ This review was written more than two years ago, but its publication may be of some historic interest and the delay, justified by the fact that it lay for more than fifteen months under the ruins of a building in which the Society had chambers—Ed.

has taken place, this in itself contributes to the establishment of a central monetary authority. To quote Kisch and Elkin, "there is no influence so potent in the way of developing the credit system on sound and progressive lines as a well-founded Central Bank." Taussig (*Principles of Economics*, I) states that "the central public bank has a conscious duty toward the public, and rightly conducted is prepared for the performance of its duty in times of stress." "Rightly conducted" is Taussig's qualification. The expression is full of question marks. It includes a number of controversial points: For instance, should ownership be public or private; should there be control by government authorities or not, and if so to what extent; should the bank deal with the public, or only with commercial banks and the government; should the bank hold the reserves of the commercial banks; how should its note issue be covered, and to what extent? These are some of the questions, and Professor Plumtre deals faithfully with all or most of them. The author makes it clear in his criticism of the five points in favour of political independence which he extracts from Kisch and Elkin's book on *Central Banking* (see above) that he favours an organization where the directors of the Bank are responsible to the government—and the arguments by which he supports his view are strong. On the question of gold cover, he makes the point that "with the need for, and use of, exchange equalization funds, any legal relationship between a country's central reserve of gold and exchange on the one hand; and its note and credit issues on the other, is likely to be overridden at any time as an archaic impediment to national monetary policy."

Professor Plumtre criticizes the advice given from time to time by experts who came to the Dominions for that purpose—on the ground that such advice almost invariably advocated the adoption of European practice based on traditional European conditions, without taking into account the peculiar conditions obtaining in a young country at the threshold of financial development. Neither is he greatly in favour of importing European Central Bankers for more permanent positions in the Dominions.

He then devotes a very interesting chapter to "Variable or Fixed Exchange Rates," in which he discusses the relative virtues of depreciation, flexibility and stability. He obviously does not share the "vivat aurum, pereat patria" attitude, which cost the Western European countries so dear in the period from 1931 to 1936.

The book touches upon many more interesting subjects; frontier finance, funds held in London, commercial and treasury bills interest rates, among others. For these we must refer readers to the book. We should like to permit ourselves just one observation. On page 279, in a footnote, Professor Plumtre explains, "for the benefit of some readers," the terms "lending," "discounting," "re-discounting." He gives an example of the way in which a discount rate of 10 per cent. on six months bill works, but he does not explain that such a discount rate works out actually at over 10½ per cent. on the money which the borrower receives, a fact which would not be immediately apparent to somebody not acquainted with the term "discounting."

This book is a valuable addition to the literature on the subject of Central Banking—and we can confidently recommend a study of it to anybody interested in these matters—especially because of the fresh and in many instances unorthodox views expressed therein. A thorough understanding of these matters will be of great value in helping to disentangle some day the present chaotic conditions in international money affairs.

J. DE BLANK.
April 24th, 1941.

STUDIES IN DIPLOMACY AND STATESCRAFT.⁴

DR. G. P. GOOCH is an historian and a publicist with an unrivalled knowledge of recent international affairs. He has read everything bearing upon them in, at any rate, four languages—English, French, German and Italian—and he has surveyed what he has read with penetrating insight and with a calm, dispassionate judgment. Hence the ten studies before us give a clear bird's-eye view of an immense field of political literature unseen by the ordinary English groundling.

Of the ten studies presented in this volume all but one have been printed in some form before. The first one, for example, on *Franco-German Relations 1871-1914* is an expansion of the Creighton Lecture of 1923. It now extends to a dissertation of some 24,000 words, which, as a lecture, would have taken some three hours to deliver. It contains, indeed, much valuable material gathered from sources published subsequent to 1923. The main thesis of the study, however, remains unaltered, namely, that the root-cause of the international unrest that disturbed the tranquillity of Europe during the period in question was the annexation of Alsace and Lorraine by Germany in 1871. The second of the studies, the only entirely new one, is a natural sequel to the first. It treats of the *Diplomatic Background of the First World War*, showing how the chronic Franco-German quarrel was complicated by an Austro-Russian conflict for dominance in the Balkan Peninsula, and by an Anglo-German naval rivalry. Dr. Gooch tends to exonerate Germany from the charge of having been peculiarly responsible for the outbreak of the war. He

⁴*Studies in Diplomacy and Statescraft*. By G. P. Gooch, D.Litt., F.B.A. 1942. (London: Longmans Green & Co.) pp. vi., 373. 12s. 6d.

reports, for example, a conversation that he had with Herr Jagow in 1929, in the course of which he said, with Jagow's approval: "The European system was the main cause of the war. Germany was dragged in by Austria; England and France by Russia. It was an East European quarrel." He blames Germany most for giving Austria a free hand on July 5th, 1914, and for not holding her in check during her proceedings of the next four weeks.

The third study is a masterly account of *British Policy before the War of 1914* based upon the exhaustive study of the Foreign Office papers 1898-1914 which, in conjunction with Professor Temperley, he undertook to edit for the Government in 1924. He shows how ardently and persistently one English Minister after another strove to maintain the peace of the world, but how all seemed to be thwarted by an inexorable fate. Here again he exempts Germany from any special war-guilt, coming to the conclusion that "the ultimate cause of the explosion was the European anarchy, the absence of international machinery, the doctrine of the unfettered national State, the universal assumption that the graver disputes could only be settled by war."

The next two studies deal with the lives and works of two prominent German Ministers, namely, Prince Bülow and Herr Kiderlen-Wächter. Bülow controlled German foreign policy during the years 1897-1909—the period when the Kaiser's shipbuilding programme strained Anglo-German relations to breaking point; Kiderlen-Wächter was in charge in 1911, at the time of the Agadir crisis, and his inept conduct of affairs nearly precipitated the outbreak of the Great War. Dr. Gooch is unsparing in his criticism of both.

The sixth study deals with *British Foreign Policy 1919-1939*, a pitiful story of amiable weakness, blind ineptitude, ineffective fumbling. It is difficult to say who comes out worse from the exposure, the successive Prime Ministers who allowed our air force to sink from first place to fifth, our navy to be depleted to impotence, our army to be reduced to a mere police force; or their colleagues, the foreign secretaries, who put their trust in the League of Nations, quarrelled with France, and allowed Germany to rearm.

The concluding four studies get away from current affairs and deal with more general and academic themes. *Political Autobiography* treats of a long series of self-revelations by prominent statesmen and politicians beginning with the memoirs of Babur, founder of the 16th-century Mogul Empire in India, and ending with Hitler's *Mein Kampf*. *The French Revolution as a World Force* is a brilliant examination of the significance of a movement which Dr. Gooch rightly regards as "the most important event in the life of modern Europe." *Politics and Morals* is an acute investigation, beginning with Machiavelli, of the relation between the ethics of private life and those of the State. Dr. Gooch is on the side of the angels. "The sovereign self-sufficing State of Machiavelli, Hobbes, Hegel, and their disciples, will have to go, for in the long run it brings misfortune to us all." The last study, on *Hobbes and the Absolute State*, a lecture delivered before the British Academy just before the outbreak of the present war, treats of the same theme. It shows how the doctrines of Hobbes lie at the base of both Nazi-ism and Fascism.

F. J. C. HEARNshaw.

FUNCTIONAL ORGANIZATION.⁶

PROFESSOR MITRANY provides the argument for the functional development of International Organization in an admirably reasoned booklet published under the auspices of the Royal Institute of International Affairs. Having discussed proposals for various forms of ideological unions he proceeds to present in a persuasive form the arguments in favour of a functional alternative. The whole trend of modern government is to organize along the lines of specific ends and needs, and according to the conditions of their time and place, in lieu of the traditional organization on the basis of a set constitutional division of jurisdiction of rights and powers. This is the case even when the authority rests on written constitutions which are still in being and nominally valid in full. As an example Professor Mitrany notes the "constitutional revolution" effected by the experiment of the Tennessee Valley Authority. This development has been proceeding in a wide variety of spheres and even while war is being waged progress has been marked.

Among the claims made in favour of Functional Organization is that it would assist to remove the difficulties created by differences of status, area of population which tend to create conflicting jealousies. "A country," the Professor writes, "might rise in the performance of a function and so in the hierarchy of its control; and most countries are likely to have the satisfaction of being in the forefront in some one activity or the other, without regard to their size—like Norway in regard to shipping, Canada in the production of nickel, Rumania in that of oil, Switzerland in the organization of leisure, and so on. In any case, leadership would be accepted more readily when it rested on evident practical claims and was coupled with practical benefits. As in national affairs, the willingness to grant a measure of power for the sake of good service is likely to temper claims to authority for the sake of prestige." The reasoning proceeds that through gradual and increasing functional developments, through the provision of common services according to needs, the

⁶ *A Working Peace System*. By David Mitrany, Ph.D., D.Sc., London: The Royal Institute of International Affairs. Pp. 56. 1s. 6d.

system would make for that approximation of social conditions and outlook which better than any constitutional device, might in time build up the solid foundation for a closer political association. Developments which have already taken place have shown that there has been no infringement of national sovereignty but each task was given an appropriate organization, and the organization was allowed to adapt and reform itself in the light of experience.

Perhaps Professor Mitrany in the process of condensing his arguments into a small space has hardly given enough attention to the development of the international technical organization between the two wars. It may be argued that his line of thought is only a natural evolutionary process based upon practical experience and deserves the most sympathetic consideration even from those who may not at once be prepared to admit that it provides the greatest hope for the future.

C. E. A. B.

PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW.⁵

As a work of reference this book should be useful, but the title is somewhat misleading, for the real subject-matter is the extent of territorial waters. Under peace conditions this problem is most commonly related to the question of fishery control, but Mr. Riesenfeld has not limited himself to fishery questions, and he does not hesitate to cite examples from controversies dealing with other matters.

In substance the volume is an index to the literary material of every kind upon the problem of territorial waters. The longest chapter is the second, in which the author has briefly extracted the opinions of no less than 227 writers, ranging from von Canerin in 1800 to Meyer in 1937. This is preceded by a shorter chapter summarizing the views of earlier writers down to the end of the eighteenth century and followed by a third chapter citing the resolutions of associations, congresses, and conferences. A brief resumé of the practice of all the maritime states forms nearly the whole of the second part of the book. The arbitration cases are rather summarily dealt with in seven pages.

All this material is summed up in six pages of "Conclusion" at the end of the volume. Mr. Riesenfeld's own view, which does not appear until the last page, is pessimistic and negative. His laborious researches have failed to yield evidence of any positive rules, and he can only insist that there ought to be some rule.

Clearly this can be no more than a starting-point for any constructive investigation. It may be useful to point out that the problem of territorial waters involves three distinct questions:—

- (1) The method of determining the base line.
- (2) The minimum or maximum width of the zone to be measured from the base line.
- (3) The question of varying zones for varying purposes.

In most of the literature these three questions are hopelessly confused, but no progress can be made until they are clearly distinguished. Under the second head there is already unanimous agreement that the minimum is three miles, and it is also agreed that within this limit the sea comes under the full sovereignty of the coastal state. In practice the question of the base line is often the most important, but it receives strangely little attention in this book. The author has failed to make it clear that this was the real question at issue in the North Atlantic Fisheries Arbitration, and he has also overlooked the very important Norwegian decree of 1935, which gave precision to the claim that the base line should be drawn to link up all headlands and islands. In the case of Norway the practical consequences of such a claim are far more important than her traditional claim to a four-mile zone.

Mr. Riesenfeld modestly disclaims any title to originality, describing his book as being merely "an annotated digest and bibliography." As such it will undoubtedly be most useful.

H. A. SMITH.

THE INTERNATIONAL EXPERIMENT OF UPPER SILESIA.⁶

THE contents of this almost unique book are fairly explained by its title. Two thirds of it is narrative, while the remainder is composed of the essential documents. Among these latter by far the longest is the Geneva Convention of 1921—a document larger than the Treaty of Versailles—which provided for the operation of a fifteen-year interim period in the Upper Silesian industrial area (1922-1937). A part of the province had been ceded to Poland by Germany after the first World War, and a variety of transitional regulations were to be enforced in order to prevent too sudden a dislocation of social and economic life. The whole thing was to be supervised by two delegates of the League of Nations.

These two men were the older M. Felix Calonder, former President of the Swiss Confederation, who became President of the Mixed Commission; and the much younger Dr. Georges Kaeckenbeeck, who, as a Belgian refugee, had gone up to Oxford in 1915, taken a double

⁵*Protection of Coastal Fisheries under International Law.* By Stefan A. Riesenfeld. xii + 296 pp. 1942. Published by the Carnegie Endowment, Washington, D.C. (Columbia University Press.) Price \$2.00.

⁶*The International Experiment of Upper Silesia.* By Georges Kaeckenbeeck. Pp. 867, with maps and bibliography (Oxford Press, 1942.) 42s.

degree in law, then become a member of the Belgian delegation at Geneva, and was now placed in charge of the Tribunal of Arbitration in Upper Silesia. The Mixed Commission had its seat on the Polish side of the frontier, and dealt mainly with Minority Questions; while the Tribunal of Arbitration was set up in Beuthen on the German side, and had charge mainly with property disputes, and with problems of domicile or citizenship. The story of their work, and that of their German and Polish colleagues, has now been given us in definitive form. M. Calonder put all his papers at the disposal of his younger colleague, and has read the text of the book—making many suggestions. Thus it has come about, thanks to the initiative of the Royal Institute of International Affairs, the enterprise of the Oxford Press, and the tireless industry of the author, that interested people the world over can now study at leisure an experiment in peace-keeping effected solely by moral and never by material forces, which endured as a shining example of what can be done, during nearly two decades of muddled and conflicting public policies.

Of the eight chapters (the ninth is "Conclusions"), whose length varies from twelve to one hundred and fifty pages, some will be read by wider circles, while others will be of interest chiefly to lawyers. The most widely advertised question of the whole interim period, as could be expected, was that of the rights and claims of minorities. Dr. Kaeckenbeek devotes the central and longest chapter of the book to the tissue of troubles connected with this problem; not because it was really more important than others, but because it consumed so much attention and was the source of such vexations. At every turn he pays well-deserved tributes to the high courage and tenacity of M. Calonder; as well as to his persistent faith in the essential goodness of human aims and motives even when the evidence seemed to be all against him. The author dwells on the "dim unreasonableness" of many for whom he and M. Calonder were toiling. In a frontier zone, where the subjective concept of national affiliation had become valid, where so many people were exposed to severe pressure—economic, social and cultural, and where the vast majority had only a poor elementary education, the variety of obstacles to right adjustments of claims was endless. The conclusion is that under such circumstances, and where Minorities are used by neighbour powers as instruments for public policy, no effective international protection of such groups is possible. Other ways must be found.

Chapter VI deals with Labour Organization and Social Insurance, a field in which Upper Silesia might give useful hints to the rest of Europe; and Chapter VII explains the working of the technical regulations that provided a reasonable measure of mobility for the densest industrial population in Europe east of the Elbe, even across the international frontier. The stabilising influence on the minds of the common people exerted by these provisions, would be in itself a fascinating study for the social psychologist.

The parts of the book that have a special appeal to legal experts are shorter in compass, but they are full of meat and are of first-rate importance, not only as history, but also for present-day guidance. In Chapter II we have noted the fact of the maintenance of Prussian law on the Polish side, with the consequent restriction of fresh legislation. Then follows an account of the work done for the protection of private property and enterprise, and, for the determination of rights of citizenship (nationality), and of domicile. It sounds curious to talk about "sorting Poles and Germans," but under the circumstances it was a far from pleasant business. In Chapter VIII we find the author's views on the organization and procedure of international organs, among which attention should be called to the special function of "evocation." Finally two documents should not be overlooked—the parting addresses of President Calonder and of Dr. Kaeckenbeek, the texts of which are to be found in French on pp. 844, sqq.

How far we have come since the high summer of 1937, when those addresses were given. How far we are today from realizing the hopes for "good neighbour" relations between Central European powers expressed by President Calonder in his closing words. In the atmosphere that has come over Europe, the kind of work done in Katowice and Beuthen between 1922 and 1937 is unimaginable. When will it be possible again? All of us live in the faith that the way of arbitration and adjustment of international disputes will one day be restored: and when this comes, Dr. Kaeckenbeek's book will be an indispensable *vade mecum* for all engaged in such work.

The printers and publishers of this huge book have done a splendid job. Although three languages, in addition to English, are constantly in use (notably in the list of cases at the beginning and in the bibliography, pp. 539, sqq), I have not yet discovered a misprint.

W. J. ROSE.

DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES.

THE first volume of a series containing Diplomatic Correspondence between the United States and Canada covered the years 1784-1820. It is believed that it was duly received and suffered destruction in one of the attacks covering the office of the Society. Apology is accordingly made that it has not received attention. There is now a second volume,⁷ which deals with the years 1821-1835. It is explained that this division does not rest

⁷ *Diplomatic Correspondence of the United States. Vol. II. 1821-1835.* (Washington: Carnegie Endowment for International Peace.) Pp. xxxviii, 1,016. \$5.00.

upon any historical basis, but is rather one of convenience in order to provide a volume of satisfactory size; on that account the remainder of the matter, which will be brought down to the year 1860, will be published in two more volumes.

The present instalment covers not only correspondence with Canada, but also with the British West Indian Colonies, as it is mainly concerned with commercial relations which were common to all.

Another subject which occupied the time and attention of the diplomatic spokesmen was the exact location of common boundaries and the national ownership of lands along those boundaries. In at least one instance they led to a reference to arbitration before the King of the Netherlands, which resulted in a convention signed in 1827. The development, however, seemed to have reached a stage when the arbitrators failed to decide some of the special questions submitted to them, and the matter was still in dispute at the close of the period.

The volume also contains records of other boundary disputes, and is in fact essential to the study, not only of the relations between the Dominions and the United States, but is also an important contribution to the history of Canada.

CZECHOSLOVAK YEARBOOK OF INTERNATIONAL LAW, 1942.

It is a pleasure to welcome the publication in English of a volume under Czech editorship devoted to the study of international law. The brave resistance of the Czech people, their sturdy independence, and their faithful allegiance to the cause of freedom are aptly expressed in the first of the articles contained in the *Czechoslovak Yearbook*⁸ written by Dr. Benes on *The Rights of Man and International Law*. Professor Brierly follows with an article on "Law, Justice and War"—another stimulating study of a problem to which he gave special attention in many writings during the period between the two wars. Professor Prochazka sheds new light for most of us on the Czechoslovak Philosophy of Law. M. Vojacek contributes a brief but interesting article on the rather neglected but intricate subject of "Post War Tasks and Patent Legislation."

The above are samples taken at random from a collection of which the variety and interest may be seen from the titles—M. Taborsky on "Munich, the Vienna Arbitration, and International Law," Professor Keeton on "Legal Guarantees of Peace," M. Drucker on "The Legislation of the Allied Powers in the United Kingdom," M. Cassin on "La Position Internationale de la Tchécoslovaquie," Dr. Schwarzenberger on "War Crimes and the Problems of an International Police Court," Professor Berriedale Keith on "The Sanctity of Treaties," M. Neustadt on "Regional Understandings and Federalism," and M. Schwelb on "The Jurisdiction over the Allied Forces in Great Britain." There are also notes on cases, useful, documents and book reviews.

The Grotius Society volume contains papers read before the Society in 1941. Our Allies will no doubt be deeply interested in the Reports of the Committees appointed by the Society to study "International Law in Development" and "The Future of International Law." These reports resulted in a lively discussion which is recorded in the pages of this volume. Professor Keeton explains his own individual approach to some aspects of these questions in a paper read before the Society on March 12, 1941. On the technical side there are papers, by Dr. Schwarzenberger on "The Aid Britain Bill and the Aspects and Duties of the U.S.A. as a Neutral Power," Dr. Loewenfeld on "The Status of Stateless Persons" and Mr. Mervyn Jones on "Modern Developments in the Law of Extradition," Dr. Lipstein contributes a paper on "Conflict of Laws before International Tribunals." This breaks into an entirely fresh and interesting field and is, so far as we are aware, the first comprehensive and thorough study of the subject (with special reference to the Mixed Arbitral Tribunals) published in England. The paper is a truly remarkable achievement in constructive research and patient scholarship. The papers in the volume are brought to a close by a chapter on the "Effect of War on Contracts," which is now in the second edition of the author's classic work on the "Legal Effects of War." Dr. (now Sir A. D.) McNair has made this difficult branch of the law one of his own special fields, and with his well-known gift of lucid exposition he guides us through the maze of case-law which has grown up around it since the days of Lord Stowell.

J. M. J.

EUROPEAN POWERS AND SOUTH AFRICA.⁹

HISTORIANS have done well for South East Africa in the last decade. In 1934 General Teixeira Botelho produced his *Historia militar e politica dos Portugueses em Moçambique*, the first large scale history of the colony of Mozambique with its thousand miles of coastline and a second edition of Volume 2 appeared in 1936; in 1938 Professor R. Coupland issued his *East Africa and its Invaders*, which mainly deals with the Arabs in territories to the North of Cape Delgado and elsewhere, while only one chapter is allotted to the Portuguese, and Dr. Axelsson's learned work *South East Africa 1488-1530* dates from 1940. Dr. Jackson's work is not superfluous, and it is only to be regretted that she has confined her attention to so

⁸ *Czechoslovak Yearbook of International Law*, 1942. Published under the auspices of the Czechoslovak Branch of the International Law Association, Donington House, 30, Norfolk Street, Strand, W.C.2. (viii and 236 pp.), 8s. 6d. *Transactions of the Grotius Society*. Vol. 27, 1942. (Sweet and Maxwell, xxxii and 312 pp.) 10s.

⁹ *European Powers and South Africa*, a study of international relations on the south-east coast of Africa, 1796-1856. By Mabel V. Jackson, Ph.D., London, 1942. (Longmans, Green & Co.), pp. vi, 284, 21s.

short a period. Her book is founded on extensive research in the Lisbon archives mainly in the new and efficiently directed Arquivo Colonial and it contains much new material; economic conditions are given particular attention and interweaving her story with that of other lands bordering on the Indian Ocean, she treats it as a background to the struggle for naval supremacy in those waters. In Chapter 2 she deals with the place of South-East Africa in naval strategy, her object being to relate her narrative to world politics. She has filled a gap in our previous knowledge of the history of Mozambique, and Portuguese and English points of view are both fairly presented; trade and trading rivalries are discussed in two chapters and foreign unofficial designs on Portuguese sovereignty, especially British policy regarding Delagoa Bay, in another. The period chosen is one of decadence, owing to neglect by the mother country of her colony, which is easily explained. In the early 16th century, when the Portuguese set out to acquire an Eastern dominion, they seized the chief towns on the East African seaboard because they rightly regarded it as the avenue to India, but about the middle of the following century the Dutch, with far more ships and manpower, had taken the principal fortresses of the Portuguese in India, Ceylon and Malaya and the latter then concentrated their attention on the colonization and development of Brazil. By comparison East Africa had no such attractions, the climate on the coast was unhealthy, the trade in slaves, gold dust and ivory could not compare in value with that of Brazil. The close of the 18th century and the first half of the 19th were a disastrous time for Portugal, owing to the aftermath of the French Revolution, the Napoleonic invasions and a civil war, followed by financial chaos. These events had their repercussion in Mozambique: the country stagnated, convicts were sent there but not emigrants, officials were miserably paid and the revenue depended largely on the slave trade. This had been taken over by the Portuguese from the Arabs, who had carried it on in the same country at least since the first century of the Christian era.

In the late 19th century a great change for the better commenced; slavery had disappeared and the British ultimatum of 1891 made the Portuguese occupy the whole of their colony and develop it; after a number of campaigns against the warlike native peoples and (in the case of that against Gungunhama) victories unexpected by foreign observers, Mozambique and the other African Colonies of Portugal seemed on the eve of the present war to have entered on a period of prosperity. In the near future the native races of the Continent will probably demand complete equality with the white man and this, sooner or later, will have to be conceded; the Portuguese, who have never known a colour bar, may hope to escape the difficulties now threatening some colonial powers in this matter.

In the 18th century neither England nor France needed bases in East Africa and they left it alone, but in the 17th the Dutch, realizing the danger to their India fleets of a hostile stronghold on the flank, made several attacks on the island fortress which gives its name to the Portuguese Colony; those of 1607 and 1608 are related in detail by a member of the garrison whose account has lately been reprinted (Antonio Duro, *Cercos de Moçambique*, Lisbon, 1937). Dr. Jackson's scholarly work has a substantial bibliography and useful maps and charts. The misprints seem to be very few, but Toriano should be Soriano and it is not clear why the Portuguese Indian district of Damão should be always written Demaum. There is a mistranslation at page 238 where the Dutch claim that they can put 10,000 men into the field and not that they have defeated the same number of Kaffirs.

EDGAR PRESTAGE.

LAND TENURE POLICIES AT HOME AND ABROAD.¹⁰

MR. SPIEGEL of the Duquesne University has collected and arranged much valuable information as to the legal background of inheritance, ownership and tenancy in Europe and America, to summarize which we are told is the chief aim of this book. In fact his researches in Europe are limited to Great Britain and Germany, references to other countries being occasional only, and in America he confines himself to the United States. The book is thus not intended to be a comprehensive account of Land Tenure Policies, but within its limits it is a useful guide.

The problem to which Mr. Spiegel most frequently turns is the determination of the advantages and disadvantages incident to owner-operated and tenant-operated farms respectively. The English farmer is, or was, usually a tenant and tenant farming is seen at its best in England. "In spirit and outlook, the English farmer is a business man and has little in common with the continental peasant." From this point of view Mr. Spiegel sketches the changes in the trend of British farming during the last 70 years emphasizing the connexion between the series of Agricultural Holdings Acts and the weakening of the large landowners interest in land improvement as also the related breaking up of large estates under the pressure of heavy duties and the steady increase in owner-operated farms. An interesting survey concludes with a forecast of a possible land nationalization of agricultural land under favourable conditions for success.

In the United States the problems of land management are of a different character indeed, but, after all, the number of varying legal frames into which land cultivation can be set is

¹⁰ *Land Tenure Policies at Home and Abroad.* By H. W. Spiegel. Pp. 171. (University of North Carolina Press, 1942.) 18s. 6d. net.

not great—and all have points of similarity. Federal action in the States is mainly concerned with the inadequate protection of farm tenants. The most notable legislation is, of course, the Bankhead-Jones Tenant Act of 1937, which Mr. Spiegel discusses at some length. Its principal aim is to enable suitable tenant farmers to buy their farms by the help of Government loans, a policy which seems to be approved by Mr. Spiegel and has proved successful on the whole.

In his final chapter the Nazi land policy is considered, and in particular the purposes and results of the Entailed Farms Law of 1933. The analysis of the motives of this strange law and its political implications is of great interest. As to results Mr. Spiegel is doubtful. "Agricultural policy under the Nazi regime," he says, "is full of tendencies which are often incompatible with each other. The gravest incompatibility seems to be the attempt to favor commercial farming for the market and to increase the agricultural output while everything is done to strengthen the pre-capitalistic attitudes and dispositions of the farms population. Thus the concept of profitableness is neglected and even despised to an unbelievable extent."

Many social reformers, politicians, and country-lovers from differing points of view desire to see the country-side settled by a numerous, stable and contented body of farming owners; the economist is concerned primarily with securing the maximum product from the land. How far these are reconcilable aims may well be doubted.

F. M. GOADBY.

WORLD ORGANIZATION.¹¹

ALTHOUGH much has happened in the realm of international affairs since the American Council on Public Affairs called a conference in Washington to discuss the post-war world in the light of the first great experiment—the League of Nations—it is useful to have in one volume the valuable papers which were presented at the conference. The contributors were mainly members of the staff of the different sections of the League of Nations with an intimate knowledge of the particular subject entrusted to each. The result is that the subjects have been surveyed from a non-political angle and with a full appreciation of their practical importance. It may even be said that in the main the argument is that in the future it will be wise to look to administrators rather than politicians to establish working international relationship. The effect of the politicians upon the League of Nations is examined by Professor Pitman Potter, Director of the Geneva Research Centre, and the place of the League in world politics by Mr. Arthur Sweetser, the Director in the Secretariat of the League who provides an admirable survey of the range of its activities.

There is a useful series of papers dealing with the technical organizations which were placed under the auspices of the League of Nations. The descriptions are provided with a historical background so that step is shown to have been only a stage in their development. Health, nutrition and housing, for example, are covered in one paper by M. Frank G. Boudreau, formerly Acting Chief of the Health Section of the League. The important work done in the suppression of the sale of narcotic drugs is described by M. Bertil A. Renborg, Chief of the Opium Section. While other papers include one on communications and transit by M. Jan Hostie, member of the Legal Committee dealing with the subject, and another by M. Henri Bonnet covering his own subject as Director of the Institute of Intellectual Co-operation.

Another part of the volume is devoted to subjects which immediately arose from the proceedings of the League and so includes Mandates and Colonies Minorities, Danzig and the Saar. Mr. Hugh McKinnon Wood, formerly Acting Legal Adviser to the Secretariat, provides a valuable contribution giving particulars of the status and work of the World Court from which he concludes that "the experience of the past does not seem to point to the desirability of any change in the rôle filled by the Court in World Organization."

To the International Labour Organization is justly allotted a part to itself in which there are two papers. One is by Mr. David H. Blieloch, Acting Chief of the Labour Inspection Service, and the other by M. Andrien Pierre Tixier, Assistant Director of the Office. The way in which the Organization has been able to continue its work under war conditions is full of hope for the future and support for the argument that on these lines may be the profitable development of international organization rather than in attempts to revise the covenant of the League which forms the subject of two papers. In any consideration of the subject the attitude of the American Continent towards the League is of prime importance and that forms the subject of a paper by Mr. Ricardo J. Alfaro, Secretary General of the American Institute of International Law. It shows the extent to which the American Republics have been thinking together and presents an aspect which often does not receive sufficient attention in Great Britain and those countries which are accustomed to adopt her line of thought. Altogether, the American Council on Public Affairs deserves grateful appreciation for a useful and stimulating volume.

C. E. A. B.

¹¹ World Organization. (Washington: American Council on Public Affairs.) Pp. xiv, 426. \$3.00.

POWER POLITICS¹²

DR. SCHWARZENBERGER is the extremely able and erudite lecturer in International Law and Relations at University College, London. For six years (1934-40) he was secretary to the newly-founded New Commonwealth Institute of World Affairs, and it is from the point of view of that association that he has written this important dissertation.

He sets out to examine the age-old problems of the relation of the state to the individual and the relation of states to one another. The novelty of his treatment consists in the fact that he seeks his illustrations from current events and applies his principles to the solution of present-day problems. He looks back with regret to the *Respublica Christiana* of the Middle Ages when all the European peoples were bound together in obedience to the universal Church, and he sees the best hope of the future in the revival of religious faith with its realization of the fatherhood of God and the brotherhood of Man. He sees the beginning of the modern chaos in the break-up of mediæval Christendom and the formation of the congeries of sovereign national states. He examines exhaustively the theory of state-sovereignty and points out how widely the theory of political supremacy differs from the reality of practical power, which is commonly exercised beneath the surface by economic groups—whether capitalist or labour—or by companies of newspaper proprietors, controllers of the popular press. He shows how, in this condition of concealed conflict international law has failed to function, and how, in particular, the hopeful experiment of the League of Nations has been rendered futile.

The first twelve chapters of the book deal with the problem of power politics in general terms. They show a complete command of the subject and an intimate acquaintance with the principal literature, English, French, and German, relating thereto. In Chapter 13 Dr. Schwarzenberger comes to grips with current affairs. He examines in that chapter the "problems before the peace makers of 1919" and lays bare the root causes of the failure of the Versailles treaties to give lasting peace to the world. He then proceeds to consider in detail the constitution and powers of the League of Nations, and he attributes the weakness of the League to its failure to provide (1) a comprehensive system for the settlement of international disputes; (2) disarmament and (3) collective security.

Looking to the future Dr. Schwarzenberger asks how can these three conditions of permanent peace be supplied. He examines with acute and penetrating skill a number of suggested Utopias. He rejects with whole-hearted abhorrence the Nazi plan of a "new order" based on the reduction of the whole human race except a single *Herrenvolk* to slavery: he regards this as the *reductio ad infernum* of power politics. He considers more sympathetically the Versailles plan, but refuses to accept it as a satisfactory solution of the problem of peace: it is a virtual restoration of the old and discredited balance of power principle. On the ground of vagueness and practical feebleness he dismisses the "Rights of Man" scheme fathered by Mr. H. G. Wells and others. He also holds that the reform of the League of Nations, in the light of its past shortcomings, will be inadequate.

Finally, in three concluding chapters (30-32) he comes to his own practical proposals which take the form of Federal Union. Under this head he discusses (1) the essence of Federation and social forces behind Federation; (2) Problems of Federation; and (3) Blue Prints for Federation. To render effective federation possible he considers that a true and genuine democracy must be established in all the federating members, and he contends that

"The limitation and control by the community of economic and financial power, and the achievement of social justice and security for all its citizens appear no less essential in order to realise a democratic community than the protection of minorities and the individual."

and he concludes with the remark:—

"Christian communities in which democracy and social justice have become a reality hold the key to victory and post-war reconstruction in their hands."

There can be no doubt that Dr. Schwarzenberger has produced a masterly book. Not only does it survey its subject in both comprehensive fulness and minute detail, but it provides each of its thirty-two chapters with an exhaustive book-list for those who wish to pursue the various themes further. To say that it is easy reading would, however, be to go too far. Its style is heavy and humourless; but for those who have energy and time to make their way through it, it provides a liberal education. Its general accuracy both of statement and of reference is remarkable. It is therefore almost a pleasure to a reviewer to find Sir William Scott (Lord Stowell) spoken of (p. 25) as "Sir Walter Scott," and the treaties of Vienna, 1815 called the "treaties of Paris."

F. J. C. HEARNshaw.

¹² *Power Politics: An Introduction to the Study of International Relations and Post-War Planning.* By Dr. Georg Schwarzenberger. 1941. (Jonathan Cape.) 21/- net.

INDIANS IN THE UNITED STATES.¹³

THE modest title of this book scarcely does justice to its importance, or to the immense amount of research that has been put into its production. Indian law lies buried under some 4,000 statutory enactments, as well as thousands of judicial and administrative decisions. The legal position is further complicated by the fact that the American Indian is subject to three separate jurisdictions. He is bound by the laws of his own tribe, or of such of them as are allowed to function, he has legal obligations to the State in which he resides, and he is subject to the supervision of the Federal Government. All native Indians are now citizens of the United States. The Handbook is the first attempt to resolve the complexity of this situation, and to make Indians, and those who work with them, aware of their legal rights. It is a by-product of the Wheeler-Howard Act of 1934 which put a stop to the policy of imposing upon tribes with different wants a uniform pattern of general laws, and also to the allotment laws under which the Indian wards of the United States had lost two-thirds of their reservation lands. Pursuant to this Act more than 100 tribes have now adopted their own constitution.

The Handbook contains 23 chapters, and includes chapters on the scope of Federal and State powers over Indian affairs, the scope of tribal self-government, personal rights and liberties in Indians, individual rights in real and tribal property, the legal status of Indian tribes, criminal and civil jurisdiction, and so on—all described with admirable lucidity and an immense wealth of legal references.

Mr. Cohn lays great stress on the sovereignty of the Indian tribe and many readers may feel that this aspect has been over-emphasized, since he himself shows that the constitutional authority of the Federal Government to prescribe laws and administer justice upon the Indian reservations is plenary, that a State has jurisdiction over many of the Acts of non-Indians within a reservation, that there are at the present time ten major offences for which federal jurisdiction has displaced tribal jurisdiction, and that federal courts have also jurisdiction over ordinary federal crimes. Nevertheless, native law is applicable over large fields, though how far it is actually applied is not clear, nor is there any indication of the extent to which there has been a synthesis of native and federal law. Mr. Cohn makes the interesting observation (p. 139) that an Indian tribe may, if it so chooses, adopt, as its own, the laws of the State in which it resides, with such modifications as it considers suitable.

From this short summary it will be apparent that the Handbook of Federal Indian Law is very much more than a guide to the legal rights and obligations of Indians. It is an authoritative history of the administration of the native Indians by the United States government, and as such should be invaluable to students of British and other systems of Colonial administration. The Handbook is published by the United States Department of the Interior.

C. K. MEEK.

STATE LAW INDEX.

DURING the years 1939 and 1940 12,608 general and permanent laws were passed by the State Legislatures in the United States. To this enormous volume of legislation an admirable *Index*¹⁴ is provided by the Legislative Reference Service of the Library of Congress. Like other good indexes it possesses in itself a considerable amount of information. For example, it is possible to trace a good deal about the difficult subject of the relations between the States and the Federal Government under the heading "United States—State Relations." The *Index* also provides particulars relating to subjects which are not readily collected together elsewhere. Among subjects which do not occupy so much attention in the legislation of the United Kingdom or the Dominions may be mentioned "Beauty Parlours," though here the admirable system of cross-references seems to have broken down as there is not one from "Cosmetologists," although Cosmetics and Perfumes have an entry of their own. The last-named heading illustrates the value of the *Index* in showing the extent to which the model Acts upon various subjects have been adopted by the different State Legislatures. In fact the volume is quite an entertaining one through which to browse as well as a necessary work of reference to anyone requiring the laws upon any particular subject in any of the different States.

The admirable series of Indices to the legislation of the States of the United States has received a further addition in volume ix¹⁵ covering the work of the Legislatures during 1941 and 1942. In a prefatory note Miss Margaret W. Stewart, who is in charge of the State Law Index, directs attention to the temporary legislation of intrinsic importance resulting from the "depression," which is indexed only under the title "rehabilitation." The entry in the index extends to nearly ten pages and covers the widespread activities of the federal funds and projects, but it is not concerned in any way with rehabilitation as the

¹³ *Handbook of Federal Indian Law*. By Felix S. Cohn. (United States Government Printing Office, Washington, 1942). pp. 662. \$2.00.

¹⁴ *State Law Index, 1939-40*. Eighth Biennial Volume. (Washington: U.S. Government Printing Office.) Pp. vii, 707. \$1.50.

¹⁵ *State Law Index, 1941-42*. Ninth Biennial Volume. (Washington: U.S. Government Printing Office.) Pp. vii, 765. \$1.75.

word is now being used so much in this country. Nevertheless, the volume contains a large amount of the legislation arising from conditions of war. Accordingly, reference may be made to an extensive heading "Soldiers and Sailors" for the items which relate to their welfare and return to civil life. In this connection, however, it is interesting to note that airmen, as individuals, do not appear in the index, though their training and licensing may be found under the heading "Aircraft." The comprehensive character of the index and the wide range of subjects covered by legislation in the States provides a number of entries full of entertainment, such for example, as that dealing with holidays and special days in which may be found, Connecticut observing an Indian day, Kentucky a Kentucky Poetry Day, Pennsylvania a bird day, and Puerto Rico repealing the observance of a Police week. Altogether Mr. E. S. Griffith the Director of the Legislative Reference Service may be congratulated upon producing a volume which maintains the excellence of the series.

C. E. A. B.

LIBERTY ABOVE LAW.

THIS little book *Above All Liberties* by Alec Craig (George Allen & Unwin Ltd., 1942) is a supplement or sequel to the earlier work *The Banned Books of England* by the same author; and will accordingly be of most use to those who possess also the earlier volume. It is in substance a plea for the repeal of the laws against obscenity and for complete freedom of expression in printing and publishing all sorts of literature. In the final chapter on "The Problem of Pornography" it is said: "So long as we chase the bogey of pornography we cannot be, we cannot expect to be, a free and civilised community."

Such a point of view is sufficient to suggest and perhaps even to establish that the mind of the author is asquint in certain matters of moral judgment. And the inference is strengthened when one reads (at page 91) that we remember Sir Charles Hall "only because he was unable to distinguish between Havelock Ellis and a common pornographer, Sir George Jessel because he insulted Annie Besant, Lord Eldon because of his foolish ideas about Shelley's poetry." The truth would seem to be that the author is out of sympathy with the common Christian tradition which informs our civilization, and his judgments are accordingly apt to appear eccentric to an ordinary man. For him the saints of modern times would seem to be Havelock Ellis and Annie Besant and Count Potocki of Montalk.

None the less this very quality of eccentricity added to wide reading in his particular field of interest gives a certain piquancy to the little volume. The chapters on Havelock Ellis and Count Potocki of Montalk are eminently readable and the contrast between the laws of obscenity in England and France and the United States is well drawn. No one with any experience of the actual working of the law relating to obscenity in England can deny or doubt that its administration is to an unnecessary degree capricious and at times stupid. In these days of universal reading there is much to be said for a reconsideration of the law by a committee of persons of experience and reasonable judgment. The author of this volume and of *The Banned Books of England* will doubtless be content if he helps to convince others of the need for such re-examination and restatement of the law.

R. O'S

ANALES DE LA FACULTAD DE CIENCIAS JURIDICAS Y SOCIALES
DE LA UNIVERSIDAD DE LA PLATA.¹⁶

SOME of the previous volumes of these proceedings were noticed in this Journal. The latest volume contains many valuable contributions on the law of Argentina and on jurisprudence generally. It is impossible to give in this review even the names only of all the papers the volume contains. But we should like to mention the essays of Professor Carlos Cossio and Sgr. J. Frias Caballero on theory of criminal law, a learned paper by Sgr. Samson Leiserson on banking, and a paper of Professor Cisneros on "law and culture before the war." To Professor Cisneros national and international law are aspects of one and the same sense of culture (dos aspectos de un sentido cultural unico). The further violation of international law goes, the graver becomes violation of law and justice within the state (pp. 19-25). Mankind should aim at the creation of a universal conscience of right and wrong, and in the rejuvenation of law, America, according to Professor Cisneros, is destined to play a great part.

The reviews of law books and articles in numerous legal magazines cover 100 pages and are of great importance to students of comparative law. Professor Enrique V. Galli is to be congratulated on maintaining in this volume the high standard of scholarship of which previous volumes have given evidence.

VLADIMIR IDELSON.

MILITARY LAW IN BRAZIL.¹⁷

A NEW quarterly solely devoted to problems of military law has commenced publication under the auspices of the Brazilian Ministry of War. Its first issue is a stately volume of some 400 pages—surely an indication of the seriousness with

¹⁶ Anales de la Facultad de Ciencias Juridicas y Sociales de la Universidad de la Plata dirigidos por Enrique V. Galli. Tomo XIII. La Plata, 1942. Pp. 837.

¹⁷ Arquivo de direito militar, publicação quadrimestral, fundada pelo General Eurico G. Dutra, ministro da Guerra, direção do Auditor Mario Tiburcio Gomes Carneiro. Ano I, N. 1. Rio de Janeiro, Imprensa Nacional, May-August, 1942. Pp. 401.

which the problems of military law are looked upon in Brazil. Much of the material concerns the specialist, especially the military historian, only. But international lawyers will be interested in the publication of the circular letter on the treatment of prisoners of war of 1865 which anticipated some of the ideas accepted in 1929 by the Geneva Convention. The volume contains a translation with notes of the Polish Code of Military Law of October, 1932, which the learned editor praises as a brilliant document of juristic achievement and which in his opinion will exert considerable influence on the reform of military law in Brazil. Foreign readers will perhaps regret that the new periodical contains no reports on actual cases decided by the Military Supreme Court. It appears that the series of Reports of decisions of this Court of which so far seven volumes have been published is going to be continued. But the interest of the new periodical would undoubtedly be increased if it were to include at least short excerpts of the more important cases.

E. J. COHN.

APPROACHES TO SOCIAL SECURITY. AN INTERNATIONAL SURVEY.

THE International Labour Office have published an admirable comparative legal study which gives the effect of the laws in operation relating to the different branches of social security. It provides a useful foundation for any legislation which may be necessary to carry out the undertakings in reference to the subject inherent in the Atlantic Charter. It covers the legislation up to the end of the year 1941, and provides a survey of the movement which has been taking place almost throughout the world. At the same time it is pointed out that we have reached a stage when the work which has been done by the International Labour Office has prepared the way for the planning of a complete social security programme and, even in the midst of war, there are signs that other nations besides our own are making progress towards the establishment of a reconstructed national life.

LABOUR IN THE U.S.S.R.¹⁸

DR. MARGARET MILLER, who knows and admires Russia, has provided an admirable summary in an historical setting of its labour legislation and the effects of its operation. Her account shows how legal pressure through the social insurance system and by other means has been brought to bear upon the worker to increase his output. It is an interesting story, which explains important points in the Russian national life at the present time, and is not without its bearing upon our own labour problems.

ARQUIVO DE DIREITO MILITAR.¹⁹

THIS issue of a new official periodical of the Brazilian Government published by the Minister of War, General Eurico G. Dutra, contains valuable material for the history of Brazilian military law, substantive and of procedure. Of especial interest is the report of discussions on the subject at the National Juridical Congress of Brazil held in 1922 (Pp. 353-487). Bibliographical notes give an appreciation of the Mexican official publication (Boletim Juridico Militar) which appears since 1935 and deals with problems of military law.

VLADIMIR IDELSON.

The following publications have also been received²⁰:—

Annual Register, 1942. 184th issue. Edited by M. Epstein, M.A., Ph.D. (London: Longmans, Green and Co., Ltd.) Pp. xii. 490. 42s.

The Annual Register observes that "the year 1942 was in no way remarkable in the world of law." Consequently, the section devoted to that subject only occupies a few pages. Nevertheless, there is a real value in a contents of the volume as a background to legislation and a record of events in a most important historical year. The publishers are to be congratulated on having maintained the standard of this long-established publication, now in its 184th year.

Brandeis, Louis Dembitz. *Proceedings of the Bar of the Supreme Court of the United States and Meeting of the Court in memory of*. (Washington, 1942.) Pp. 56.

Brazil: *Ata Final da Terceira Reuniao de Consulta dos Ministros das Relacoes*. (Rio de Janeiro: Imprensa Nacional, 1942.) Pp. 120.

— *Parceres do Conselho de Estado e do Consultor do Ministerio dos Negocios Estrangeiros*. (Rio de Janeiro: Imprensa Nacional, 1942.) Pp. xviii. 194.

Brierly, J. L. *The Law of Nations*. (Oxford University Press.) Pp. viii. 272. 6s.

— *English Law*. Oxford Pamphlet on Home Affairs. (Oxford University Press.) Pp. 40. 6d.

Professor Brierly has made an admirable addition to the series of Oxford pamphlets designed to provide the basis of facts on which the citizen can rely in forming his own opinion about the many tasks of national reconstruction after the war. The main point

¹⁸ *Labour in the U.S.S.R.* Margaret Miller: (British Association for Labour Legislation. pp. 49 9d.)

¹⁹ *Arquivo de Direito Militar*. Ano. I. Setembro a Dezembro, 1942. N.2. Rio de Janeiro. (Imprensa Nacional).

²⁰ Mention here does not preclude review later.

raised by Professor Brierly is the cost of litigation and in that connection he directs attention to the effect of the division of the legal profession into two branches, though he adopts a judicial attitude as regards their fusion.

Balogh, E. *Political Refugees in Ancient Greece*. (Witwatersrand University Press.) Pp. xvi. 137. 7s. 6d.

Chicago, University of. *What shall we do with Germany?* Bernadotte E. Schmitt. Pp. iv. 22.
— *Alien Enemies and Alien Friends in the United States*. Ernst W. Puttkammer. Pp. iii. 23. 25 cents each.

Professor Schmitt contributes the thirty-eighth of a series of pamphlets published by the University of Chicago with a view to providing information upon matters of acute public interest by members of the staff, who can write with authority. As Professor of modern history, Professor Schmitt is able to deal with the problem of what is to be done with Germany with the knowledge of one who has studied the conditions from the time of his first visit in 1906 to the last in 1935. Professor Puttkammer's contribution is more legal and explains the status of aliens, both enemies and friends, in the United States. It is a useful piece of work in a concise and convenient form.

Clerks-at-the-Table in Empire Parliaments, Journal of the Society of, for 1941. Vol. X. (London: Butterworth and Co. (Publishers), Ltd., 1943.) Pp. iii. 219. £1.

Dillon, Conley Hall. *International Labor Conventions*. (Chapel Hill: University of North Carolina Press.) Pp. xii. 272. 18s. 6d.

Grigg, Sir Edward. *The British Commonwealth. Its place in the service of the World*. (London: Hutchinson and Co. (Publishers), Ltd., 1943.) Pp. 174. 5s.

Sir Edward Grigg has put into book form the result of the study of the more immediate problems of Imperial Policy by a group of Parliamentary colleagues. The result provides the material which may become the background of legislation. The book does not attempt to lay down policies but only to indicate the problems upon which the future of the Empire turns and the best method of attacking those problems. The first essential is the unity of the Commonwealth as a "Middle Term" of international co-operation. For this there is needed a change of mind, so he thinks, "amongst the democracies of the Commonwealth to make them act upon the knowledge that independence in self government is not a question of status only but also of organized and earned security." Sir Edward Grigg believes that the division of the Commonwealth into two divisions comprising governments with independent and dependent status is incompatible with its unity. Accordingly he is in favour of Empire Regional Councils which would organize sessions of Parliamentary Delegations with meetings of a purely consultative character in no way derogating from the existing sovereignty of National Parliaments. It will thus be appreciated that the book is one which is suggestive in matter and useful in its scope in the discussions of problems which affect all parts of the Empire.

Grotius xxiii. *Transactions*. Volume 28. (London: Sweet and Maxwell, Ltd.) 1943. Pp. xxiii. 176. 15s.

Humphrey, John P. *The Inter-American System*. A Canadian Review. (Macmillan Co. of Canada, Ltd.) Pp. xi. 329. \$3.00.

Jobim, Jose. *The Mineral Wealth of Brazil*. (Rio de Janeiro: Livraria Jose Olympio Editora.) Pp. xiii. 169. \$1.50.

Madras Code, in four volumes. Vol. I. Sixth edition. (Madras: Superintendent Government Press, 1940.) Pp. xviii. 268. 2 rupees 10 annas.

— Vol. II. Sixth edition. (Madras: Superintendent Government Press, 1940.) Pp. viii. 515. 4 rupees.

Nigeria. *Report of the Cost of Living Committee*. Lagos. 1942. Published on behalf of the Government of Nigeria by the Crown Agents for the Colonies. Pp. 155. 7s. 6d.

This volume contains the report of a special committee appointed by the Governor to consider the adequacy of pay, of labour, and of African Government Servants and Employees, in the township of Lagos. The principal effect of their recommendations was to raise the pay of the lower categories of wage earners in relation to those in the higher categories in a way similar to that which has been observed in the United Kingdom. The principal part of the report is devoted to a cost of living survey similar to that which has been conducted in Jamaica, Sierra Leone and other Colonies with a view to establishing the cost of living index figure for guidance for fixing the increases and as a basis for the assessment of the extent of any changes in the future. The result is an interesting survey of the economic conditions of the people of the country and the changes which have come about as the result of war conditions.

Nova Scotia, Union of the Municipalities of. *Proceedings of the 37th Annual Convention*. 1942. Published on behalf of the Government by the Crown Agents for the Colonies. Pp. 155. 7s. 6d.

Nussbaum, Arthur. *Principles of Private International Law*. (London: Humphrey Milford.) Pp. xvi. 288. \$3.50.

Pollock on Contracts. Eleventh edition. Edited by P. H. Winfield, F.B.A., LL.D. (London: Stevens and Sons, 1942.) Pp. xxxii. 603.

In the six years since the publication of the last edition of this book there have been a considerable range of judicial decisions and changes in legal thought necessitating its revision. In particular, Dr. Winfield has found it necessary to revise the portions dealing with the doctrine of frustration, of public policy and of certainty of terms in a contract. The particular contribution, however, which he has made to this edition is the introduction of a wide range of American references chiefly based upon the latest edition of Williston's *Law of Contracts* and the *Restatement of the Law of Contracts*. This method of treatment enables students and even practising lawyers to appreciate the distinctions and affinities between the laws as developed on both sides of the Atlantic. In fact, this new edition may be regarded as an important example of the contribution which may be made by the academic lawyer to the work of the practising lawyer.

Schwarzenberger, Georg. *International Law and Totalitarian Lawlessness*. (London: Jonathan Cape, Ltd.) Pp. 168. 10s. 6d.

Silveira, Alipio. *La Interpretacion de las Leyes frente a los Regimenes Politicos*. (Sao Paulo.) 1943.

Survey of English Law. (Annual.) London School of Economics and Political Science Department of Law. (London: Sweet and Maxwell, Ltd.) Pp. xxvii. 295. 15s.

Professor Parry and his collaborators appeared to have experienced even more difficulty in producing their *Annual Survey of English Law* than were encountered in the publication of the Society's *Review of Legislation*. The volume published during the summer covers the year 1940 and it is announced the plans are on foot to produce the survey for 1941 and 1942 in one volume. The maintenance of this series in spite of all difficulties will be appreciated by those who depend upon the survey as one of the most convenient works of ready reference upon current law, its literature, legislation, and decisions.

Soares, Alvaro Teixeira. *Roteiro de uma Viagem*. (Rio de Janeiro: Imprensa Nacional, 1942.) Pp. viii. 256.

United States Library of Congress. *Sources of Information on State Legislation*. 1941-2. (Washington: Library of Congress Legislative Reference Service.) Pp. 56.

World Court Reports. Vol. IV. 1936-42. Edited by Manley O. Hudson. (Washington: Carnegie Endowment for International Peace, 1943.) Pp. xvi. 513.

The following periodicals have also been received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Australian Law Journal; Bombay Law Journal; Bombay Law Reporter; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Colombia Law Review; Eugenics Review; International Labour Review; International Review of Agriculture; Journal of the Parliaments of the Empire; Juridical Review; Law Quarterly Review; Madras Law Journal; Medico-Legal Review; Modern Law Review; New York University Law Quarterly Review; Revista Juridica de la Universidad de Puerto Rico; Revue Internationale de la Croix Rouge; South African Law Journal; Toronto University Law Review; Tulane Law Review.

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Let observation, with extensive view,
Survey mankind from China to Peru.
SAMUEL JOHNSON.

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